TAKING NOTE OF THE NOTE IN IDGT SALES

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I. <u>Creating the Note and Valuation of the Note</u>

A. IDGT sales often result in a large note. This note has significant estate planning ramifications and this is the subject of this lecture.

B. One of the first questions is whether this sale is in fact a sale and whether the debt is valid and effective consideration in the transaction. These sales are seldom arms-length and there are seldom independent lawyers on both sides of the transaction. It would be better if there were. There is nearly always an appraisal from an independent appraiser that establishes the value of the sale. This is very important. The IRS does not like transactions close to death and particularly where the one party is represented by someone acting on a power of attorney.

A loan transaction will be respected as bona fide debt when the following apply: the parties intended for a loan to exist and there was a reasonable expectation that the loan would be paid at the time it was made.[1] There is always heightened scrutiny when there is family on both sides of the transaction. You have to look at the documents and testimony and the subjective intent of the parties.[2] The fact that the deal was a bad one should not of itself create a situation where the loan is treated as a gift. You look to whether the transaction is bona fide, arm's length and free from donative intent.[3] The fact that it is a bad bargain does not mean that it is a gift. People enter into bad bargains every day.[4] The Courts have entered into a multi-faceted approach in deciding whether a debt is in fact debt:

1. Interest
2. The existence of a note[5]
3. Repayment schedule
4. Security or collateral
5. A demand for payment
6. Records reflecting a loan
7. Actual payment

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[1] *Van Anda's Estate v. Comm'r*, 12 T.C. 1158.1162 (1949), aff'd, 129 F. 2d 391 (2nd Cir. 1951)

[2] *Hicks v. Comm'r*, 94 T.C.M. (CCH) 43 (2007); *McFadden v. Comm'r*, 84 T.C.M. (CCH) 6 (2002); *Hunt v. Comm'r*, 57 T.C.M. (CCH) 919 | 1989

[3] *IRS Reg. Section* 25.25 12-8*; Anderson v. Comm'r*, 8 T.C. 706, 72d – 12 (1947)

[4] See *Messing v. Comm'r,* 48 T.C. 502, 511-512 (1967), acq., 1968 – 2 C.B. 1

[5] *Estate of Mixon v. United States,* 464 F. 2d 394, 403 (5th Cir. 1972)
Fin Hay Realty Co. v. United States, 398 F. 2d 694, 696-97 (3rd Cir. 1968)

8. The solvency of the borrower[6]

A factor that may be beneficial is whether the note matures during the lifetime of the creditor. Although this is not a requirement.[7]

C. It is now well established that the planning benefits of a grantor trust where the grantor is obligated to pay the estate tax does not give rise to a gift to the trust.[8] There are other benefits that accrue from the planning. It is a freeze at the date of sale. Finally, there is the interest rate on the sale. Sales are often made by bifurcating assets and the value of the shares are discounted. This adds to the effectiveness of the planning.[9]

D. The IRS itself laid the foundation for this planning. In the case of *Rothstein v. United States*,[10] the taxpayer created an irrevocable trust. Several years after the formation of the trust, the Taxpayer purchased shares from the trust in exchange for a promissory note. The taxpayer then liquidated the corporation and used the purchase price as the basis for the shares. This gave rise to a loss and the taxpayer claimed this loss. The IRS won in the District Court in that the Court said that there was carryover basis when the shares were sold to the Taxpayer. This was reversed by the US Court of Appeals for the Second Circuit. This court found that the grantor trust rules only applied to income tax and not to all of the other aspects of the Code. The IRS responded to this by issuing *Revenue Ruling* 85-13[11]. It would not follow the *Rothstein* case. This position has been criticized by persons who feel that these sales to defective grantor trusts are abusive.[12] The feeling is that as long as the IRS follows the positon in this *Revenue Ruling*, it will have to put up with these sales.

E. As a result of Revenue Ruling, 85-13, the IDIT does not exist for income tax purposes. It can even use the Social Security number of the grantor.[13] The next question that arises is the note itself. The IRS has asserted in litigation that if the

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[6] *Miller,* 71 T.C.M. (CCH) 1679

[7] *Monon Railroad v. Comm'r,* 55 T.C. 345 (1970) acq. 1973 – 2 C.B. 3, where there was a 50 year note and the court recognized that this was a long period of time. However, the court looked at the substantial nature of the business and said that this was reasonable to the circumstances

[8] *Revenue Ruling,* 04 – 64

[9] *Revenue Ruing,* 93 – 12,
In the Revenue Ruling, the IRS said that if a person gave half of a property to one child and half to the other, a discount would be applied to each half

[10] *Rothstein* 574 F. Supp. At 20; *Rothstein v. United States*, 235 F. 2d 704, 710 (2d Cr. 1984)

[11] *Revenue Ruling, 85-13*

[12] *Jay A. Soled and Mitchell Gans*, "Sales to Grantor Trusts: A Case Study of What the IRS and Congress Can Do To Curb Aggressive Transfer Tax Techniques." 78 Tenn. L. Rev. 973 (2011)

[13] Treasury Regulation Section 671 – 4(b)(2)(i)(A) and 301.6109 – 1(a)(2)(i)(B)

note bears interest at the Applicable Federal Rate under *IRC Section* 1274, then the note has a gift tax value of the face amount of the note and this argument was accepted by the Tax Court.[14] Where the note is a term note and the note uses the AFR, then the present value of all the payments is equal to the face of the note and there is no gift when the ale is entered into.[15] In the *Frazee* case, the Tax Court was asked whether there was a gift where the note used by the buyer had an interest rate equal to the AFR. The Tax Court said that the fair market value of the note would determine whether there was a gift involved in this case. It was the IRS who argued that the value of the note in this context would be determined pursuant to the rules in *IRC Section* 7872. The Tax court Stated as follows:

> "Under Section 7872, a below market loan is recharacterized as an arm's length transaction in which the lender is treated as transferring to the borrower on the date the loan is made the excess of the issue price of the loan over the present value of all the principal and interest payments due under the loan. The transfer by the lender to the borrower is deemed a gift. By enacting section 7872, Congress indicated that virtually all gift transactions involving the transfer of money or property would be valued using the current applicable Federal rate. Section 78721(f)(2)(B). In so doing, Congress displaced the traditional fair market value methodology of valuation of below-market methodology of valuation of below-market loans by substituting a discounting methodology."[16]

F. Section 7872 is not a valuation regime that can be elected; it is mandatory when valuing money-purchase notes. The Tax Court had a relook at this issue in the case of True.[17] The most important factor here is that the Tax Court adopted this position after the IRS requested that it adopt this position. This was the position that the IRS wanted. In the *True* case, the Court extended this concept to apply to deferred compensation arrangements. All of this results in money purchase notes being valued differently at different times. When the note is later valued at the time of gift or death, one has to look at *IRC Sections* 2512 and 2031 but at the time of inception, the safe harbor under *IRC Section* 7872 applies. In other words, if you use the AFR rate then the note is valued at face at the time of sale.

G. The sale needs to avoid the provisions of IRC Sections 2036 and 2702 in order to be successful. There must be no retention of the right to income from the

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[14] *Fraizee v. Comm'r*, 98 T.C.C. 554 (1992);
Estate of True v. Comm'r, 82 T.C.M. 27 (2001), aff'd on other grounds, 390 F. 3d 1210 (10th Cir. 2004); PLR 9408018; PLR 9535026

[15] *IRC Section 7872(e)(i) – (2), (f)(i)*

[16] 98 T.C. 588-89. See also *Blackburn v. Comm'r*, 20 T.C. 204 (1953)

[17] *Estate of True v. Comm'r*, 82 T.C.M. (CCH) 27, 123-25 (2001)

transferred property. Under Section 2702, the focus is on a transfer to a trust for family and the value of the transferred interest is zero unless the asset transferred is a qualified annuity or unitrust interest. Section 2702 would cause the promissory note to be valued at zero and the entire sale would be a gift. Because the payments on the note are generally from income of the property sold, it is easy to see how the IRS might try and argue that there is a retained income interest number. This issue was dealt with by the US Supreme Court in *Fidelity Philadelphia Trust Co. v. Smith*[18] where the Court set out the circumstances under which a sale in exchange for deferred payments might be includable in the estate under *IRC Section* 2036. The Court said that the size of the payments should not be related to the income generated by the property. Also, the debt created by the promissory note must be a personal obligation of the transferee and must not be chargeable solely to the transferred property. If you use the AFR rate of interest, then you satisfy the first test laid out by the Supreme Court. The 10% cushion should satisfy the next test laid out by the Court. This can be with a gift funding or a guarantee. This 10% was based on a discussion between Byrle Abbin and the IRS when obtaining PLR 9535026. This is not a bright line test.

H. But what happens to the promissory note at death? Is there gain recognition at death? It is clear that the trust ceases to be a grantor trust at death. It may be that there is a deemed sale at that time under the rationale in *Madorin v. Commissioner*.[19] It is clear from this case, that the tax shelter that was about to start giving out phantom income triggered tax when the grantor trust status was terminated during life. It was deemed to be a transfer to a non-grantor trust at that date number. But what happens on death? Does the *Madorin* concept apply? Also, what happens to the basis of the promissory note on death? If the seller's death is a taxable event, then there is no step up since the note is IRD. There would be gain to the extent that the balance due on the note exceeded the basis immediately before death, increased by any adjustment under *IRC Section 691(c)*. If gain is not recognized at death, then the note is not IRD. The absence of IRD results in the note getting a new income tax basis at death under *IRC Section 1014* and this is equal to the value of the note at death. If there is a discount on the note, then you risk the conversion of the tax free amounts to ordinary income under the market discount rules under *IRC Sections 1276 to 1278.* This issue is discussed by Michael Mulligan in his extensive writings on sales to Grantor Trusts. He concludes that there is no gain on death.[20] He argues that the note acquires a new basis based on the value of the note in the estate at

[18] 356 U.S. 274 (1958)

[19] 84 T.C. 667 (1985)
See also Treasury Regulation Section 1.001(c), Example (5) and Revenue Ruling 77-402, 1977-2 C.B. 222

[20] See a "Realty of Sale" Analysis of Installment Sales to Grantor Trusts: Property Structured, The Best Transfer Tax Strategy, Michael Mulligan

death but he recognizes that there are many respected persons who hold other views.

II. <u>Graegin Loans in Dealing With the Note in the Estate</u>

A. A Graegin Loan is an option that is used by illiquid estates to reduce and defer the estate taxes. The estate borrows money instead of selling assets. This is particularly useful where the estate may not qualify for an IRC 6166 deferral.

B. IRC Section 2053(a)(2) allows for the deduction of administrative expenses from the gross estate. Regulation Section 20.2053-3(a) provides that the administration expenses are limited to expenses that are actually and necessarily incurred in the administration of the decedent's estate. Non-essential expenses that are incurred for the benefit of the heirs are not deductible. A loan is reasonable and necessary when it prevents a forced sale of assets and when it prevents the sale of an asset at a price that is below market. See Revenue Ruling 84-75, 1984-1 C.B. 193; *Estate* of *Todd v. Commissioner*, 57 T.C. 288 (1971) ; *Estate of Thompson v. Commissioner*, 76 T.C.M (CCH) 324 (1996); *Estate of Graegin v. Commissioner*, T.C.M (CCH) 387 (1988); *Estate of Huntington v. Commissioner*, B.T.A. 698, 726 (1937)

C. The Courts have been asked to make a determination in these estates as to whether there was sufficient liquidity. This is done in the backdrop of a situation where the Courts are reluctant to second guess the Executor. The IRS on the other hand look and see whether the illiquidity is self-inflicted. An example of this would be a situation where the taxpayer created a family limited partnership. The estate does not need to exhaust all liquidity to qualify. The term of the loan should also bear some relationship to the expected period of illiquidity. In the case of *Estate of Murphy v. U.S.*, 104 AFTR 2d 2009-7703 (W. D. Ark. October 2, 2009) the estate borrowed about $11M from a Family Limited Partnership on a nine-year Graegin note and about $41M from another trust on a regular note. The IRS tried to argue that the illiquidity was self-inflicted. The Court rejected this argument saying that at the time the Partnership was set up for significant non-tax reasons and at the time it was set up the decedent retained sufficient assets to pay for his living expenses and his estate taxes. The Court also said in this case that if the Executor acts in the best interest of the estate, the Court will not second guess the business judgement of the Executor.

D. The interest deduction was also allowed in the case of *Keller v. U.S.*, 104 AFTR 2d 2009-6015 (S.D. Tex. August 20, 2009). In this case the Court found that the loan passed the economic substance test and that it was entered into to preserve the liquidity of the estate.

E. Where there is an identity of interest between the borrower and lender the Courts will closely scrutinize the need for the loan.

F. Estimated interest payments can be deducted where the amount is ascertainable with reasonable certainty and where the interest is certain to be paid.

G. A fixed rate of interest for a specified term will generally be respected. Graegin loans generally have a prohibition on the prepayment of the loan or a substantial penalty on prepayment. Sometimes they provide that upon default, all of the outstanding interest will become due and payable.

H. The Courts have to make a determination as to whether there is sufficient liquidity to pay expenses and taxes. The IRS has sought to argue that in many instances the liquidity crisis is self-created. For example, where a family limited partnership is created. If you take all of the liquidity in an estate and put that into a family limited partnership, then the IRS may take the position that the liquidity crisis is self-created. A portion of the loan interest may not be deductible where liquidity becomes available after death. See *Estate of Gilman v. Commissioner*, WL 2985851 (U.S. Tax. Ct.). The Court held in a case that the fact that the estate qualified for an IRC Section 6166 deferral did not impact the ability to qualify for a Graegin loan. See the case of *McKee v. Commissioner*, 72 TCM (CCH) 324 (1996). In fact, the Graegin loan can be used to pay the payments under IRC Section 6166. See PLR 200020011. The term of the loan should bear some relation to how long the illiquidity is expected to persist. See *Estate of Graegin v. Commissioner*, 56 TCM (CCH) 448 (1999).

I. The IRS has sought to argue that the loan has no other non-tax purpose other than reducing estate tax. This sounds similar to the argument that has been made for Family Limited Partnerships. The Courts have closely scrutinized the situations where there is an identity of interests between the lender and the borrower.

J. The future interest payments are deductible if they are certain to be paid. The Courts will respect a loan that is made for a fixed rate for a fixed term of years. The Courts will honor a prohibition on prepayment of a substantial prepayment penalty. See PLR 199903038 and PLR 199903039 and *Estate of Graegin, supra*.

K. What is important in these cases is to show that assets will have to be sold to pay the tax and expenses, and that if assets are to be sold then they will be sold at a reduced price. See *Estate of Todd v. Commissioner*, 57 T.C. 288 (1971) and *Estate of Duncan*, TCM 2011-255. In the *Duncan* case, there was an irrevocable trust and a revocable trust, and the latter borrowed money from the former to pay the taxes. By the time this got to Court, the estate had generated enough money to pay the tax, but this was not foreseeable at the time of death.

L. The Courts are loathe to second guess the business decisions of the Executor. See the case of *McKee v. Commissioner*, 72 TCM (CCH) 324 (1996) and the *Duncan* case, supra. Where the Executor says that the estate needed money to pay for a contingent increase in estate taxes, then the Court will likely honor the Executor’s decision. See *Estate of Sturgis v. Commissioner*, 54 TCM (CCH) 221 (1987). In the Graegin case, supra, the Executor borrowed about $204,000 from The Graegin Corporation, which was a wholly owned subsidiary of Graegin

Industries that was 97% owned by the decedent or his son. All of the interest was due on the maturity of the note after 15 years and all of the interest was deducted on the return. The Court was disturbed by the single payment of interest after 15 years, but it concluded that this was reasonable in the circumstances in question. The Court believed the Executor when he said that he would repay the note. There was on outside shareholder in this case that owned 3% of the Company and the Court found this comforting in the light of the identity of interest in this case.

M. What about the life insurance trust? This is never part of the estate and it often has a lot of liquidity. By definition, there cannot be a statement in the life insurance trust that says that the assets will be used to pay the estate taxes. This issue came up in the case of *Thompson v. Commissioner*, 76 TCM (CCH) 426 (1998). The Court looked at the estate and said that it had insufficient assets to pay for the taxes and to provide for a major asset of the estate which was a Cane Mill. The estate also had to pay other expenses relating to the Cane Mill and the Court noted that the estate did not have to completely deplete its liquid assets in order to qualify for Graegin treatment.

N. It is important to take out the loan at a time while the estate is being administered and not after the administration. In the case of *Estate of Lasarzig v Commissioner*, 78 TCM (CCH) 448 (1999), the Court disallowed the deduction where the loan was taken out after the estate had been distributed to the beneficiaries and the Court said that the loan was for the benefit of the beneficiaries.

O. An interesting case is the case of *Estate of Hughes*, 133 Cal. App. 4th 121 (2005). In this case Mark Hughes died with an estate of more than $300M and the estate taxes amounted to more than $212M. Most of the trust assets were in limited liability companies with stringent restrictions on distributions. The Estate borrowed money to pay the taxes using a Graegin type loan that was made through an intermediary (the tax attorney) and then from a related entity that had the liquidity. The loan amounted to $49M and the estate taxes were reduced to about $45M. The Court in this case was looking at whether this made sense and whether the tax attorney was looking to profit from the plan. The Court looked at the income tax cost to the lending subsidiary company that had made the loan and it present valued this income tax cost. The Court also looked at the benefit that passed to the tax attorney and concluded that the net benefit to the estate was in the region of $113M. This illustrates how any person should look at the benefit of a Graegin loan. There is always a question of cost in that the phantom income will generate an income tax over the period of the loan and then this has to be present valued.

P. An example of a loan where the interest was said to be non-deductible is in TAM 2005-13028 (September 15, 2004). The decedent and his spouse created a Partnership and the estate owned 99% of this Partnership. The loan was made from the Partnership. The Partnership had substantial liquid assets. A child who was the Executor owned the 1% general partnership interest. There was no fiduciary restraint on the child from distributing the liquid assets from the Partnership and the Partnership had no active business that needed the liquidity. The identity of interests and the circular nature of the payments where significant factors in this case. The Court also rejected the deduction of the loan interest in the case of *Estate of Black v Commissioner*, 133 T.C. 340 (2009). In this case a FLP sold about a third of its very large block of stock in a public company on a secondary offering and it generated about $98M in the FLP. The FLP loaned about $71M to the estate for taxes and expenses as well as a charitable bequest. The son was the executor and the managing partner. The Court said that the distribution of funds would not have breached the son's fiduciary duty to the Partnership. The Court seemed to put a lot of emphasis on the fact that the estate would not have to liquidate assets to pay the tax. If the Estate's interest in the Partnership had been redeemed, it would have been redeemed at a discount and the economic benefit of this would have passed to the other partners. This could have been viewed as a breach of the managing partner's fiduciary duty and it could be argued that the Court was substituting its decision for that of the executor in this case. The significant take home from this decision is that it is difficult to always know what factors the Court will hang its hat on, and with an increase in the number of Graegin cases going to Court, this is not always something that a taxpayer would be willing to implement.

Q. In the Case of *Estate of Koons*, TCM 2013-94, the loan interest was said to be non–deductible. In this case the estate had about $19M of liquid assets and the tax was about $26M. The estate borrowed about $10.75M from an LLC. This LLC had taken over the remaining assets of a Company that distributed PepsiCo products. The LLC had offered to redeem out decedent's children from the LLC shortly before he died. The LLC had liquid assets of more than $200m. The IRS asserted that the tax liability was about $84M. The taxpayer sought to deduct about $71M of interest on the return. The Court disallowed the deduction because the estate could have forced a distribution from the LLC. The estate tried to argue that this would leave the LLC with less cash with which to buy businesses. The Court said that the loan would do the same thing as the distribution and there would in any event be less money with which to buy businesses. The Court's reasoning in *Koons* is similar to the reasoning in the *Black* case, supra, where the Court said that the Executor could simply have made a distribution. Also, in both cases, the estate had no other way of repaying the loan and the distribution from the LLC would have to be made in any event to repay the loan. The *Koons* case went up to the Eleventh Circuit Court on Appeal. See No. 16 10646. The Appeal Court said that a loan is unnecessary if the estate lacks any other assets with which to repay the loan and will need those same assets to repay the loan. Where the loan simply delays using the assets to repay the loan by making the loan, then it is unnecessary. The Court also said that it did not have to defer to the Executor's business judgement in all instances. The extreme length of the loans in *Koons* probably was a factor that led the Court to believe that the interest would not be deductible.

R. The IRS has stated informally that it is continuing to look for opportunities to contest Graegin loans. This is particularly true in situations where the liquidity is self-inflicted using a family limited partnership. The IRS is particularly concerned that the deduction will be allowed and that later on the interest will not be paid and so the income will not result in a tax. Where the note provided for no prepayment, it is difficult to understand the concern of the IRS in that there should be forgiveness of indebtedness income if the loan is not paid.

S. When you calculate the amount of the loan and the length of the loan, this should have some bearing on the specific illiquidity in the estate. One cannot completely do away with the tax using this method. You have to borrow enough to pay the tax and expenses that are payable after you deduct the interest from the loan. This is a circular interrelated computation. If the lender is a California entity, then the tax on the interest will be significantly higher than the saving for the estate tax. On the other hand, if the entity is in a state that does not pay state income tax then the rate is very similar and there is the added advantage from the time value of money.

III. <u>Charitable Lead Trusts in Dealing With the Note in the Estate</u>

A. Charitable Lead Trusts (CLTs) created during lifetime or as a Testamentary Lead Trust, offer significant deferral opportunities. For example, if you put $10M into a 20-year Charitable Lead Annuity Trust and you zero out the remainder which will cause there to be no transfer tax, the annual payment to charity will, as of today, be 611,600. This is approximately 6.11% of the underlying $10M of assets. It the $10M of assets is a discounted value, with a discount of 50% (the author recognizes that this is a high percentage), then the rate of return on the underlying asset that would be needed to zero out the transfer tax is 3.05%.

B. In 2007, by way of Rev. Proc. 2007-45, 2007-29, I.R.B. 89, the Service came out with sample Charitable Lead Trusts. Similarly, in Rev. Proc. 2007-46, 2007-29 I.R.B. 102, the Service came out with a Testamentary Charitable Lead Annuity Trust for a term of years. In 2008, the IRS came out with sample forms for an Inter Vivos Grantor and Nongrantor Charitable Lead Unitrust and a Testamentary Charitable Lead Unitrust. See Rev.Proc. 2008-45, 2008-30 I.R.B. 224. In Rev. Proc 2008-46, 2008-30 I.R.B. 238, the IRS provided sample forms for a Testamentary Charitable Lead Unitrust for a term of years. In the Rev. Proc's, the IRS indicated that it would not issue a Letter Ruling on whether an Inter Vivos Charitable Lead Annuity Trust or Charitable Lead Unitrust satisfied the requirements for a charitable deduction. However, it indicated that it would issue rulings on any substantive trust provisions other than those contained in the sample forms. The provision in the trust instrument which provides that if the trust does not qualify as a CLT, then the assets will be returned to the donor, would, in the opinion of the IRS, disqualify the trust. See Rev. Ruling 76-309, 1976-2CB 196. However, in Rev. Ruling 60-276, 1960-2CB 150, obsoleted by Rev. Ruling 91-4, 1991-1CB 57, the IRS took a different position. The IRS may permit a conditional return provision in a Charitable Remainder Trust where the return of the assets is contingent on the receipt of a favorable Private Letter Ruling and not the approval of the grantor's income tax deduction. It would appear that this should apply to Charitable Lead Trusts as well. A better way of dealing with all of this is to provide that the trustee can amend the document to make it qualify as a CLT. The Code expressly permits such an amendment in Section 1022(a).

C. In order to qualify as a CLT, the grantor must provide for an annual payment to charity in the form of a guaranteed annuity or a guaranteed Unitrust interest. These can be for a term of years or life. In contrast to the Charitable Remainder Trust, there is no 20-year limitation on Charitable Lead Trusts established for a term of years. The payment must be paid periodically (but at least annually).

D. The guaranteed annuity amount must be determinable upon the establishment of the Charitable Lead Trust. One of the big advantages of a Charitable Lead Trust is that you can set the payments up as a fixed percentage of the assets that are being transferred into the Trust. This allows for a formula Charitable Lead Trust. For example, if the service increased the value on audit, there would be no tax generated by the transfer. All that would happen, is that the payments to the charity would increase. The key to qualification of a guaranteed annuity is that the amount of the Charitable Lead interest must be a sum certain that is readily determinable at the outset. The Regulations state that the amount of the stated sum may be changed by a specified amount at the expiration of the term but may not be re-determined by reference to any fluctuating rates like the Cost of Living Index. See Reg. § 1.170A-6(c)(2)(i)(A) and Reg. § 20.2055-2(e)(2)(6)(a). It is possible to have a shark fin annuity amount or an annual increasing annuity amount. See the discussion below. This may impact the desire to of the IRS to audit an estate that uses a formula Charitable Lead Trust.

E. The excess income that accrues in the annuity trust can either be retained in the trust or distributed to the charitable beneficiaries. However, the deduction is based on the guaranteed annuity payment to the charity. Where you provide for excess income to be paid to the non-charitable beneficiary, care must be taken to include language prohibiting transactions taxable under § § 4943 and 4944. See Rev. Ruling 88-82, 1988-2CB336.

F. The Private Foundation excise taxes under IRC §§ 4941-4945 apply to Charitable Lead Trusts. The governing instrument of the Charitable Lead Trust must contain certain prohibitions with respect to certain private foundation rules. However, in the case where the present value of the charitable lead interest does not exceed 60% of the assets of the trust computed on the valuation date, the governing instrument of the Charitable Lead Trust is not required to prohibit acquisition and retention of IRC § 4943 Excess Business Holdings and IRC § 4944 Jeopardy Investments.

G. If there is provision in the CLT for private purposes before the expiration of all charitable lead interests, then the lead interest will not be considered a guaranteed annuity interest. See Regulations § 1.170A-6(c)(2)(i)(E) and Regulations § 20.2055-2(e)(2)(iv)(f). There are two exceptions to this general rule. Firstly, an amount may be paid for a private purpose if the amount is in the form of a guaranteed annuity interest and the trust governing instrument does not provide any preference or priority for the private annuity over the charitable annuity. Secondly, an amount may be paid for a private purpose if the governing instrument provides that such amount is payable only from assets devoted exclusively to private purposes and to which IRC § 4947(a)(2) does not apply.

H. The annual amount payable to charity may provide for any dollar or percentage amount. There is no 5% minimum annual payout requirements nor is there any 5% exhaustion requirement that applies to Charitable Remainder Annuity Trusts. If the income in the trust falls short of what is needed to be paid out, the trustee must use principal to pay to charity.

I. Unlike Charitable Remainder Annuity Trusts where additional contributions made after the initial contribution are prohibited, there is no such similar prohibition in the case of the CLT. However, one cannot get a deduction for additional contributions since the amount of the annual guaranteed annuity payment must be determinable at inception. These additional contributions may be useful where the trust has insufficient income to pay the annuity amount. In PLR 200149016, the IRS ruled that an additional contribution to a CLT would qualify for the gift tax charitable deduction where the earnings from the additional contribution were kept in a separate account. In this Private Letter Ruling, each of the accounts was a separate Charitable Lead Annuity Trust that complied with the determinable amount requirements of a CLT.

J. In the case of the Unitrust, a fixed percentage of the net fair market value of the trust is determined annually and paid to charity. The trustee again has the obligation to pay the Unitrust amount even if the trust income in a given year falls below the amount of the payment. Once again, the Unitrust payments may be for a term of years or for the life or lives of one or more of the individuals. In the case of lives of individuals, each individual has to be living at the date of the transfer to the trust. See Reg § 20.2055-2(e)(2)(vii)(a). Once again there is no 20-year limit on the term of years alternative. You can also have a life plus a term of years.

K. If you have a qualified contingency described in § 664(f), a Charitable Remainder Trust is not disqualified. A qualified contingency in the case of a CLT will disqualify the trust.

L. For the purposes of valuing the Unitrust amount, one may use the value on any one day during the trust's taxable year or by taking the average of valuations made on more than one day during the year. You do, however, have to use the same method of valuation year after year. If the trust is silent on this issue, then the trustee must select the date or dates and indicate the selection on the trust's first income tax return. See Reg §§1.170 A-6(c)(2)(ii)(A) and 20.2055-2(e)(2)(vii)(a).

M. If the charitable beneficiary is to receive the lesser of a sum certain or a fixed percentage of the assets, this will not qualify as a Charitable Lead Unitrust. For the purposes of calculating the annual payment to charity, one may use the cash or accrual method of accounting. Regardless of which one you use, one must be consistent.

N. You can have a provision in the governing instrument of the CLT Unitrust which provides that excess income can or must be paid to the charitable beneficiary. See Reg §§1.170 A-6(c)(2)(ii)(C) and 20.2055-2(e)(2)(vii)(b) and 25.25522(c)-3(c)(2)(vii)(d). This excess amount which is paid to charity will not avail the grantor of an additional deduction. However, if the CLT is a grantor trust, then the grantor would be permitted an annual income tax deduction for the amounts paid to charity to the extent that they exceed the Unitrust amount. In the case of a Non-Grantor Lead Trust, the trust is entitled to an IRC § 642(c) income tax set aside deduction.

O. One cannot have the Unitrust percentage varying over the term of the trust. See Reg §§1.170 A-6(c)(2)(ii)(A) and 20.2055-2(e)(2)(vii)(a).

P. Once again, a CLT will not be considered a Unitrust interest if any amount may be paid by the trust for private purposes during the lead period. As in the case of the Charitable Lead Annuity Trust, there are two exceptions. Firstly, you can provide for a private purpose as long as the governing instrument does not provide any preference or priority for the private Unitrust interest over the Charitable Unitrust interest. Secondly, you may have a governing instrument which provides that an amount may be paid for private purposes out of assets devoted exclusively to private purposes and to which IRC § 4947(a)(2) does not apply by reason of IRC § 4947(a)(2)(B). The 2003 amendments (which reflect the Tax Court decision in *Boeshore Estate v. Commissioner* , 78 T.C. 523 (1982), Acq., 1987-1C.B.1.) permit a seriatim Non-Charitable and Charitable Unitrust interest. As in the case of an Annuity Charitable Lead Trust, payments for legal services and trustee fees are for consideration and are not paid for private purposes.

Q. There is no minimum 5% payout requirement for a Charitable Lead Annuity Trust and the 5% exhaustion requirement applicable to certain Charitable Remainder Unitrust does not apply.

R. You may make additional contributions to a Charitable Lead Unitrust. You also get an additional gift tax contribution for additional contributions. Compare the Annuity Lead Trust where no deductions are allowed for additional contributions.

S. The Annuity Lead Trust works better where the income is increasing over time and the Uni Lead Trust where the income is expected to decline over time.

T. There is no completed gift where the donor retains the power to select the identity of the charitable recipient. See Reg § 25.2511-2(b), (c) and PLR

200328030. Similarly, where the grantor holds a fiduciary position with the charitable beneficiary, then the gift is incomplete. However, in PLR 8130033, the IRS ruled that a completed gift of the annuity interest had been made where the grantor was a director of the charitable organization. Where the family members are in control of the charity, there is still a completed gift. See PLR 200030014. By keeping the grantor out of the control of the portion of the funds that come from the Lead Trust, one would be able to have the gift be complete. See PLR 200138018 and 200108032 and 199908002.

U. The Internal Revenue Code does not define the permissible term of Charitable Lead Trust. The Regulations prescribe that the term may be a term of years or the life of the individual (or individuals who are living at the date of transfer).

V. The Charitable Lead Trust must have one or more charitable income beneficiaries and one or more non-charitable beneficiaries. The trust does not fail to qualify under IRC 2522(c)(2)(B) where the grantor does not designate specific charitable beneficiaries. The trustee may have the power to select new charitable beneficiaries each year. If the grantor has the power to change the charitable beneficiary or the remainder beneficiaries, then the corpus of the trust will be included in his or her estate for estate tax purposes. See PLR 200328030.

W. If the grantor of an Inter Vivos CLT is a member or director or officer of the charity, then the corpus will be included in his or her estate under IRC § 2036(a)(2) with a charitable deduction permitted for the present value of the income interest. See *Rifkind v. U.S*., 5 CL.Ct. 362 (1984). The same will not occur if the spouse or children act as officers or directors of the charity.

X. Under IRC § 170(f)(8), a taxpayer who claims a deduction to charity of $250 or more is responsible for obtaining from the donee a contemporaneous written acknowledgement of the contribution. The Regulations provide that this substantiation requirements will not apply to a Grantor Charitable Lead Trust. See Reg § 1.170(a)-13(f)(13). You also do not need the substantiation requirements for a non-Grantor Charitable Lead Trust because the deduction arises by virtue of IRC § 622(c) and there are no substantiation requirements under that Section.

Y. A Non-Grantor CLT is taxed as a complex trust. Any income in excess of the allowable deduction is taxed to the trust. The trust receives an IRC § 642(c) income tax deduction for income paid to charity. There is no statutory tier system for the payments to charity. The governing instrument will prevail and if it is silent, then payments to the charitable beneficiaries will be considered to consist of a pro rata portion of all items of the trust income. Effective April 16, 2012 the IRS amended the IRC § 642(c) Regulations to provide that a provision in a trust, will or local law specifically indicating the source out of which amounts of income are to be paid, permanently set aside or used for an IRC § 642(c) purpose, must have an economic effect independent of the income tax consequences in order to be respected for federal tax purposes. If the governing instrument has no such provisions, the amount to which § 642(c) applies is deemed to consist of the same proportion of each class of the items of the trust's income as the total of each class bears to the total of all classes. It is still desirable, however, to allocate all depreciation, amortization, and depletion deductions to the trust. See Regulations § § 1.642(e)-1, 1.611-1(c)(4) and 1.167(h)-1(b).

Z. If a Charitable Lead Trust has unrelated business taxable income, this may result in a portion of the Charitable Lead Trusts IRC § 642(c) charitable deduction being disallowed.

AA. The trustee of a Charitable Lead Trust must prepare and file an income tax return each year. (A Form 1041). The trustee must also prepare a K-1 indicating the beneficiaries of all items of income, deductions and credits.

BB. In Revenue Ruling 88-27, 1988-1C.B. 331, the IRS ruled that a trust with a prepayment provision did not qualify as a CLT. The reason for this was the exact amount of the annuity interest would not be determinable at the time of the gift. Many of the private foundation rules contained in IRC § § 4940 to 4948 apply also to Charitable Lead Trusts.

CC. A generation skipping transfer tax occurs when the income or corpus is transferred from the CLT to a skip person. One may only apply the GST Exemption to the value of the assets that emerge from the Lead Trust at the end of the lead period. A Charitable Unitrust is not subject to IRC § 2642(e) and an exemption allocation made at the time of funding will be effective for the date of funding value. If one is using a Charitable Lead Annuity Trust, skip persons should not become beneficiaries in the event of the death of the remainder beneficiary. The generation skipping tax may also be reduced by purchasing assets into a generation skipping trust at a discounted value and by funding the CLAT with a note. The note is generally funded into an LLC before contribution to avoid any self-dealing issues. See the attached Ruling.

DD. Another way to deal with the generation skipping tax consequences is to provide that if the child who is the beneficiary of the Charitable Lead Trust, dies before the end of the term, then the child's share will go to the child's estate. See PLR 9533017 and 9534004. It is also possible to give the child a general power of appointment over the remainder interest. See § 2652(a)(1) and Regulation § 26.2652-1(a)(2) and PLR 200043039. In this private letter ruling, the remainder interest of an Inter Vivos Charitable Lead Unitrust was to pass into separate trusts for the grantor's children after a 30-year term. Each child was to have a lifetime general power of appointment over his or her share after reaching age 35. The IRS ruled that the child would become the transferor for GST purposes after that time. However, the IRS also ruled that the grantor would be the transferor for GST purposes if the child died before age 35. The IRS therefore concluded that the grantor could allocate GST exemption to the trust at the end of the 30-year term.

EE. There is an interesting Private Letter Ruling 200107015 where there was a 25-year Charitable Lead Annuity Trust and the trustees had certain powers to amend the trust beneficiaries at termination. The trustees were planning on amending the trust so that 1/6 of the remainder would vest in one child of the grantor. The trustees were then going to release their power to change the disposition at termination. The child was planning to assign his remaining interest to his own children and file a gift tax return. The IRS ruled that the child would become the transferor of a portion of the trust equal to the present value of 1/6th of the remainder on the date of the assignment. The grantor remained the transferor of the balance of the trust. However, the IRS warned that the form of the transaction might be disregarded since it appeared that this was an end run around the GST leveraging that IRC § 2642(e) was designed to prevent.

FF. An independent trustee of a Non-Grantor Charitable Lead Trust is not prohibited from having the power to sprinkle the annuity or Unitrust payments among a class of charities. The same would apply to an independent trustee having the power to sprinkle the assets among a class of beneficiaries at the end of the term.

GG. The grantor may transfer mortgage property to a Charitable Lead Trust. If the mortgage was acquired immediately prior to transfer, there could be unrelated business taxable income problems. If the indebtedness exceeds the grantor's basis in the property, then there could be gain recognition. See Regulation § 1.1001-2.

HH. The Charitable Lead Trust is a form of a freeze and freezes work very well where there are significant valuation discounts in play or where the property in question has significant income or appreciation. If non income producing properties transfer to the Charitable Lead Trust, this should be balanced with high-yielding securities or income producing properties or cash.

II. Because gifting results in a carryover of basis and because income tax rates have gone up precipitously, Inter Vivos Charitable Lead Trusts should be funded with high basis assets. This problem does not occur with the testamentary Charitable Lead Trust where one receives a step-up in basis at death.

JJ. A distribution of corpus from a Non-Grantor Charitable Lead Trust to the charitable beneficiary in satisfaction of the fixed dollar obligation is a sale or exchange by the trust and could result in capital gains. See Regulations § 1.661(a)-2(f) and Revenue Ruling 83-75, 1983-1C.B.114. This gain may be offset by the charitable deduction arising from the payment to the charity.

KK. Borrowing by the trust may avoid the adverse tax and economic consequences associated with the sale or distribution of assets to the charity. This may be a method of providing funds in a year where there were insufficient funds to make the charitable payment.

LL. It is possible to have a varying annuity amount as long as it is determinable at inception. The Regulations also provide that the amount of the annuity may be changed at the end of the term by a specified amount so long as the redefined annuity amount is not determined using a fluctuating index or the principal valuation of the trust at the time of the change. See Regulation §§ 20.2055-2(e)(2)(vi)(a) and 25.2522(c)-3(c)(2)(vi)(a). Charitable Lead Trusts are not subject to any minimum or maximum payout requirements. One possibility is the so-called “Step” Charitable Lead Annuity Trust where the annuity gradually increases. For example, the annuity amount may increase by 120% of the fixed fraction or percentage payable in the preceding year. See Regulation § 25.2702-3(b)(2)(ii)(B) where the payment increased by 120%. Therefore, it may be assumed that increasing the payment by 120% would not be considered abusive by the IRS, since this is the figure contained in the Regulation. Then there is the shark fin or balloon payment trust which starts off with a very low annuity amount and then in the final year has this large increase in the annuity amount. This type of planning allows the growth assets to remain in the trust for a long period of time and maximizes the amount that would pass on to the remainder beneficiaries. This is definitely more aggressive than the gradually increasing rates. At this point in time, there is no clear authority from the IRS as to whether this type of planning is considered abusive. On the other hand, there is no authority that it is abusive.

MM. Charitable Lead planning is dependent on the 7520 rate. Charitable Lead Trusts function significantly better in an environment where the 7520 rate is low. Some practitioners who provide for testamentary Charitable Lead Trusts in their documents, will in fact provide for a phase out of the Charitable Lead Trust as a planning device if the 7520 rate should exceed a certain percentage.

NN. Besides creating a Qualifying Non-Charitable Grantor Lead Trust, it is also possible to create a Non-Qualifying Non-Grantor Charitable Lead Trust. In this instance, the charitable income interest is not stated; and there is a guaranteed annuity or Unitrust amount. The settlor does not usually make a completed gift of the income interest to the charitable beneficiary when the trust is created and is not entitled to any gift tax charitable income tax deduction at that time. On the other hand, a gift of the trust income to charity is made annually at which time the settlor receives a gift tax deduction. The income of this trust is not taxed to the grantor. This trust is used to avoid the private foundation rules and to ensure that the trust charitable deduction will equal its income.

OO. It is possible with a Testamentary Charitable Lead Trust to completely eliminate the estate tax on the assets passing to the trust. For example, if the asset that passes to the Charitable Lead Trust is an asset that yields income at a 7% rate of return, and if the asset is discounted for valuation purposes at a 40% discount, then using a 20 year Charitable Lead Annuity Trust and the interest rates in December 2013, it will take approximately 60% of the income from the transferred property to completely eliminate the estate tax on the assets in question. In the case of a Testamentary Charitable Lead Trust, the property in question will receive a step-up in basis. The Testamentary Charitable Lead Trust is taxed as a complex trust under the general rules set forth in Subchapter J and will be entitled to an IRC § 642(c) income tax charitable deduction for amounts paid to charity. What is in effect happening, is that the payments to charity are being made with pretax dollars. In the case of real estate assets, where the income will be partly sheltered by depreciation deductions, most of the remaining income after paying the 60% to the charity will be free of income tax.

PP. It is generally not desirable to have the business assets (whether they are real estate or a manufacturing company) pass into the charity. The Charitable Lead Trust is subject to all of the private foundation rules. The family is therefore precluded from buying the business assets out of the Charitable Lead Trust. There is however an exception. During the administration of the estate, assets may be purchased from the estate with Court approval. If the assets given in exchange for the business assets that are in the estate are less liquid, then a Private Letter Ruling is required. If there is an option agreement in place, then there is once again no Private Letter Ruling required.

QQ. The self-dealing restrictions that apply to Private Foundations also apply to CLTs. A disqualified person may enter into a purchase of assets that are bequeathed to the CLT in certain circumstances set out in the Code. This only applies where the property is unreservedly destined to be transferred to the foundation. See Reg. §§ 53.4941(d)-1(b)(8), Ex (3) and PLR 9014063 and PL 200003051. There are certain exceptions to the self-dealing rules. One of these exceptions exists where the executor is required to sell the property under the terms of a valid option agreement. See PLR 199930048 (May 6, 1999). See Reg. § 53.4941(d)-1(b)(8), Ex(4). The transaction has to be approved by the probate Court and the transaction must be completed during the reasonable administration period. See Reg. § 1.641(b)-3. The estate or trust must receive an amount that equals or exceeds the fair market value of the foundation's interest or expectancy, taking into account the terms of the option agreement. The foundation must receive an interest or expectancy as liquid as the one it gave up. Alternatively, the foundation must receive an asset that it uses for its exempt purpose or the transaction is required under the terms of the option agreement. See PLR 9320041 and PLR 200207028 and 200207029. See also Reg. § 53.4941(d)-1(b)(3). See also PLR 8942054 dealing specifically with a Lead Trust. See also PLR 200232033 (May 16, 2002), PLR 200124029 (March 22, 2001), PLR 9501038 (October 6, 1994), PLR 8006029 (April 3, 1980). In three identical rulings (200625015, 200635016 and 200635017 dated June 8, 2006) the taxpayer created single member LLCs and contributed notes to the LLCs. The LLCs were engaged solely in passive investment activities. The nonvoting units were allocated to the CLATs. The taxpayer then granted option agreements to the children to purchase the nonvoting units at fair market value after death. The IRS ruled that this was not impermissible self-dealing under the Regulation. The retention of the LLC by the CLAT was held not to be an act of indirect self-dealing because of the fact that the CLAT would not have control over the LLC (it only owned the non-voting units on a note). Furthermore, the LLC would be excluded from the definition of “business enterprise” under IRC § 4943(d)(3)(B) and Regulation § 53.4943-10(c)(1) and the non-voting units will not constitute “excess business holdings” under §4943. In PLR 20092704, the decedent’s son owned corporation that exercised an option (cash option) to purchase timber properties from the estate where the properties were bequeathed to the foundation. The son and daughter were the executors of the estate and the son was the director of the foundation. The IRS held that the facts here met the requirements of the estate administration exception and are therefore not subject to the self-dealing rules. See also the PLR attached to this outline.

RR. The IRS will rule on the more liquid than issue. See PLR 9320041 when the IRS ruled that a note secured by real estate is more liquid than the real estate itself.

SS. The Internal Revenue Code also imposes a punitive excise tax on excess business holdings in a private foundation (or a CLT). See IRC § 4943. “Excess business holdings” is the amount of stock which the foundation would have to dispose of to a non-disqualified person in order for the remaining holdings of the foundation to be permitted holdings. “Permitted holdings” are 20% of the voting interests reduced by the percentage of voting interests owned by all disqualified persons. However, if all disqualified persons together own 20% or less of voting interests, non-voting interests will also be treated as permitted holding. Permitted holdings, increase to 35% if the private foundation and all disqualified persons together own 35% or less of the voting interests and effective control is held by persons other than disqualified persons. Where there is a gift or bequest in a business holding to a private foundation, the foundation has five years to dispose of the interests. Note that the term “business enterprise” does not include a business that earns more than 95% of its income from passive sources. The sale of the business enterprise will avoid the violation of the excess business holdings rule.

TT. When a foundation (or a CLT) makes an investment that jeopardizes the carrying on of the exempt purposes, penalty taxes are imposed. This is when the managers of the foundation fail to exercise ordinary business care and prudence in making an investment. This rule does not apply to an investment that is gratuitously transferred to the foundation. See IRC § 4944 and Regulation § 53.4944-1(a)(2). In PLR 200024052 the IRS concluded that the lead trust receipt by gift of notes from a disqualified person, is not a jeopardizing investment under the Regulations.

UU. Where a taxpayer has an interest in charitable giving, a portion of a large gift may never be deductible for income tax purposes. This problem arises because of the percentage limitations on annual deductions and the five-year carryover period. See IRC § 170(b)(1)(A) to (E). A Nongrantor CLT is allowed as unlimited fiduciary income tax charitable deduction for payments out of income that it makes to charity. See IRC § 642(c). The income from the property that is transferred to the CLT accrues to the trust and the trust gets an offsetting charitable deduction (no limit on the amount of the deduction).

VV. To achieve an income tax deduction for a charitable gift made using a CLT, the donor must be treated as the owner of the CLT for income tax purposes. There are a number of ways to achieve the grantor status. These include the following:

(a) retention by the grantor to substitute property with property of the trust for equal value. See IRC § 675(4)(C);

(b) the trust making a loan to the grantor that is not repaid by year end. See IRC § 675(3); and

(c) a non-adverse party adding beneficiaries (individual or charitable or both). IRC § 674(a) and 674(b)(5).

WW. Where there is a grantor CLT, the trust is not recognized as a taxpaying entity. In 2009 the IRS in PLR 2009 20031 concluded that a grantor CLT could not distribute appreciated assets to the charity without tax incidence. The IRS cited Reverse Ruling 83-75. 1983 CB 114 (in which taxable gain results on a Nongrantor Trust's distribution of appreciated property in payment of a charitable annuity) as authority for its position. It also cited *Kenan v. Commissioner*, 114 Fed 217 (2nd Cir. 1940) as authority for this position (here the estate funded a specific bequest with appreciated property). The IRS seems to be ignoring its policy of treating a grantor trust as being owned by the owner of the CLT. Neither of the two authorities relied on in the private letter ruling involved a grantor trust.

XX. A gift to a CLT results in a tradeoff of future income versus a current deduction. This is the time value of money. On the other hand, the benefits of doing this may be enhanced where the taxpayer avoids adding more income in a year where he or she is paying tax at marginal rates.

YY. Comparing the CLAT to IRC § 6166 is an interesting exercise. Generally speaking, the 6166 deferral will push more assets down to the family than the CLAT. However, this does not take into account the following:

(a) The 6166 deferral has a variable interest rate;

(b) The T-CLAT may be less likely to be audited than the 6166 deferral;

(c) The T-CLAT may be extended beyond that of 6166 deferral which is limited to a fifteen-year deferral;

(d) The advantage of the charitable entity cannot be quantified in dollars;

(e) The 6166 deferral precludes the sale of the property subject to deferral without the loss of the deferral; and

(f) The taxpayer has to qualify for the 6166 deferral and the IRS may challenge the qualification.

ZZ. Charitable Lead Trusts featured in two fairly recent Tax Court cases. See *Estate of Moore v. Commissioner*, TCM 2020-40 and *Estate of Powell v. Commissioner*, 148 T.C. 392 (2017).

(a) In the Moore case, the Court denied the charitable deduction for a formula gift from the living trust. The IRS argued that no deduction should be given because the formula adjusted with any increase in value due to audit. The Court agreed with the contention. The Court distinguished both *Estate of Christiansen v. Commissioner,* 586 F. 3d 1061 (8th Cir. 2009) aff'g 130 T.C. 1 (2008), and *Estate of Petter v. Commissioner,* 653 F. 3d 1012 (9th Cir. 2011), aff'g T.C. Memo 2009-280 on the basis that at Mr. Moore's death, it was not known whether the CLAT would receive any assets. This argument is just plain wrong. It makes every marital deduction formula unworkable.

(b) The Court referred to the case of *Estate of Marine v. Commissioner*, 97 T.C. 368 (1991) aff'd 990 F. 2d 136 (4th Cir. 1993). This was a case where the personal representative had discretion to select persons for gifts where the persons had contributed to the well-being of the decedent. There was a charitable residue the deduction of which was disallowed because the amount was uncertain.

(c) However, in *Moore*, the event that made it uncertain was the audit of the IRS. This is identical to the normal minimum amount marital formula clause.

(d) The distinguishing of *Christiansen* and *Petter* is also just wrong. The Court said that in those two cases, the transfers were not contingent on an event and that in Moore the transfer was contingent on an event. However, those two cases both deal with the resolution of a dispute about includability or value as of the date of death and not some post death event.

(e) In the Powell case, there was a Charitable Lead Trust set up for the life of the grantor. The grantor died shortly after the trust was set up. This was a windfall for the taxpayer who transferred a large sum to family and a small insignificant sum to charity. However, the Court disallowed the charitable deduction on the basis that the CLAT was not authorized by the power of attorney.

AAA. There are several articles that have discussed the benefit of the CLAT:

(a) Matthew J. Madsen, Funding a CLAT with a Note Can Accelerate the Transfer of Wealth to Heirs, 30 Est. Pl. 495 (2003).

(b) Donald Tescher and Barry A. Nelson, The Frozen T-CLAT, 143 TR. & EST 33 (July 2004).

(c) Daniel L. Daniels and Dave T. Leibell, Planning for the Closely Held Business Owner: The Charitable Options, 40 Philip E. Heckerling Institute on Estate Planning § 1402 et. seq. (2006).

(d) Donald R. Tescher, Testamentary Charitable Lead Trusts: When They Should Be Used in Estate Planning, and Don't Overlook the Income Tax Planning Opportunities, 48 Tax Management Memo 411 (October 27, 2008).