

Practitioners Fret Over Deductibility of Executor, Trustee Fees

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By Jonathan Curry

Although the [IRS has indicated](#) that regulations addressing the deductibility of estate executor and trustee fees are coming, practitioners say the ultimate outcome is far from certain.

At issue is how the temporary repeal of miscellaneous itemized deductions from 2018 through the end of 2025 under [section 67\(g\)](#) relates to [section 67\(e\)](#), which says that trusts and estates can adjust their adjusted gross income by the amounts of various expenses that were incurred in the administration of the trust or estate, Steve R. Akers of Bessemer Trust Co. explained April 26 at an American Law Institute Continuing Legal Education estate planning conference in Austin, Texas.

“Does that get wiped out by section 67(g)? We don’t know the answer to that for sure,” Akers said.

However, Ronald D. Aucutt of McGuireWoods LLP said that because [section 67\(e\)\(2\)](#) includes deductions that are crucial to trusts and estates — for example, the deduction for distributions of income from an estate or trust — that bolsters the view that section 67(e) did not fall victim to section 67(g). “Income taxation of trusts and estates simply would not work if it did not have that deduction, and that is a compelling reason why 67(e) is preserved and we’ll continue to see trusts and estates be able to deduct those things,” Aucutt said.

Aucutt pointed to recent regulatory changes and court decisions, including the 2008 Supreme Court decision in *Knight v. Commissioner*, [128 S. Ct. 782](#) (2008), and 2014 regulations ([T.D. 9664](#)) stating that some ownership costs, investment costs, and gift tax return preparation costs are not protected by [section 67\(e\)\(1\)](#) and thus are subject to the 2 percent floor on miscellaneous itemized deductions imposed by [section 67\(a\)](#).

“The good news now is that 2 percent floor is gone,” Aucutt said. “But the bad news is all the deductions are gone.”

Those regulations also said that in cases of bundled fees, the only function that has to be separated out by the “reasonable method” is the investment advice, Aucutt said. He added that even in his “optimistic view” — that the section 67(e)(1) deductions for trust and estate administration fees will continue to be allowed — the investment advice component will no longer be deductible at all, instead of being allowable up to the 2 percent floor.

“That is not a good result, but it is the result when Congress sticks things onto areas that have all of this history, like the regulations, and expect things to work so simply,” Aucutt said.

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