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by Alan L. Montgomery and Ryan L. Montgomery

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In this article, the authors continue their examination of a client's joint and survivor grantor trust and reaffirm their conclusion that the entire trust remains an eligible S corporation shareholder after the first spouse's death, and that no electing small business trust or qualified subchapter S trust election is required until after the death of the surviving trustor.

I. The Question

In our 2022 *Tax Notes* article, "The Joint and Survivor Grantor Trust and the S Election" (JSGT article[1]), we described a joint and survivor grantor trust as a non-foreign irrevocable trust jointly created by married couple trustors H and W for the benefit of their child and funded with S corporation shares owned as community property. H and W retained joint and survivor section 675 borrowing and substitution powers over the entire JSGT.

The JSGT article asked the following question that has not yet been answered by any court in the years since the term "grantor" was first defined by regulation[2]:

> If H is the first grantor to die, survived by W, is W then only a 50 percent deemed owner of the JSGT because she is the transferor of only 50 percent of its property, or is W the 100 percent deemed owner of the JSGT because the portion to which her retained powers described in section 675 then extend is 100 percent?

If the answer to this question is 50 percent, then the other 50 percent portion of the JSGT ceases, upon the death of H, to be an eligible S corp shareholder described in section 1361(c)(2)(A)(i) and instead is described in section 1361(c)(2)(A)(ii) (a terminated grantor trust). A terminated grantor trust must make an electing small business trust or qualified subchapter S trust election within the two-year period described in section 1361(c)(2)(A)(ii) for that portion of the JSGT to remain an eligible S corp shareholder.

On the other hand, if the answer to the question is 100 percent, no portion of the JSGT will be a terminated grantor trust upon the death of H, and no electing small business trust or qualified subchapter S trust election will be required to maintain the entire trust's eligibility as an S corp shareholder until after the death of W.

The JSGT article concluded that, since the deemed ownership of a multiple-grantor trust is allocated by section 675 and reg. section 1.671-3(a)(3) exclusively in proportion to the control retained rather than the property transferred and H's retained control is extinguished by his death, W's sole continuing retained control over the entire JSGT thereafter makes W the deemed owner of 100 percent of the JSGT for life.[3]

[1] Alan L. Montgomery and Ryan L. Montgomery, "The Joint and Survivor Grantor Trust and the S Election," *Tax Notes Federal*, Mar. 28, 2022, p. 1815.

[2] For purposes of section 675, reg. section 1.671-2(e)(1) defined "grantor" for the first time. "Before the regulations were promulgated, there existed no definition of 'grantor' for purposes of sections 671-677." *Gould v. Commissioner*, 139 T.C. 418 (2012).

[3] Similar conclusions were reached in Darin Jensen, "Continuation of Grantor Trust Status for an IDGT After the Death of One Grantor," *Est. Plan. J.* (June 2023).

This article reaffirms that view and critiques letters to the editor and two recently published articles addressing the issue. It also examines our estate tax return audit experience and private letter ruling application and explains why the IRS appears to agree with the conclusion we reached in the JSGT article.

II. Why It Matters

The JSGT article lists some of the benefits that millions of U.S. S corp owners could realize from our conclusion, including simplified S corp reporting, cost reductions, and possible gift and estate tax savings. But those benefits are not the reason for our finding that W is the 100 percent deemed owner of the JSGT following the death of H. Rather, that conclusion is based on a consistently harmonious interpretation of section 675 and its regulations.

A. S Corp Election Reporting (Section 1362(f))

There are an estimated 5.1 million S corps in the United States,[4] most of which are small businesses.[5] Subchapter S was enacted by Congress in 1958 with bipartisan support in an effort to relieve private enterprise from the double taxation associated with C corporations.[6] To tailor that relief to small businesses, S corp status was made subject to certain limitations,[7] the inadvertent violation of which could result in the unplanned termination of the S election (inadvertent S termination).

The congressional policy favoring the validity of the S election and disfavoring inadvertent S terminations is demonstrated in section 1362(f) (providing generous relief from invalid or inadvertently terminated S elections) and Rev. Proc. 2013-30, 2013-36 IRB 173 (providing simplified relief for late-filed elections made within three years and 75 days of the election effective date).

Under the facts assumed in the JSGT article, if W is the 100 percent deemed owner of the JSGT after surviving H, then no inadvertent S termination can result solely from the death of a grantor until after W's death. But if W is only the 50 percent deemed owner of the JSGT after H's death and does not timely file the section 1361(c)(2)(a)(ii) election, relief must be obtained from the inadvertent S termination under section 1362(f).

With millions of S corp tax returns for the IRS to oversee, greater use of JSGTs could avoid many inadvertent S termination relief requests, saving time and resources for both the IRS and taxpayers. Because there can be no terminated grantor trust until after the death of W with a JSGT, the income tax reporting remains simpler and less expensive for the rest of W's life, because no electing small business trust or qualified subchapter S trust reporting for any portion of the JSGT is required.

B. Gift and Estate Tax Reporting Under Rev. Rul. 2004-64

When H and W concurrently, or surviving grantor W solely, are treated as the owner of the entire JSGT under section 675 and then pay all the income tax attributable to the JSGT income until the death of W, the amounts of that income tax paid are not treated as taxable gifts to the trust beneficiaries under Rev. Rul. 2004-64, 2004-2 C.B. 7. Thus, at the deaths of H and W, the amount of income tax paid during their lifetimes is not included in adjusted taxable gifts on their respective federal estate tax returns. That in turn reduces the estate taxes for those S corp owners who have estates large enough to exceed today's generous federal estate tax exemption amount.[8]

For example, in *Estate of Purdue*,[9] in which we represented the taxpayer,[10] the Purdue Family

[4] "The S corporation has become the dominant business structure in the United States; the number of businesses classified as an S corporation increased by 839 percent between 1980 and 2021, growing from about 545,400 to over 5.1 million." Jordan Haring, "A Primer: The TCJA and S Corporations," American Action Forum (Aug. 15, 2024). *See also* IRS Statistics of Income Publication 5655 (rev. 9-2025).

[5] S Corporation Association of America, "The History and Challenges of America's Dominant Business Structure" (last accessed Oct. 7, 2025).

[6] *Id.*

[7] "Corporations were required to be a domestic enterprise; have a limited number of shareholders; certain ineligible shareholders could disqualify the S election, and there could be only one class of stock." *Id. See also* section 1361, et seq.

[8] Generally, $13.99 million per taxpayer through 2025 and $15 million per taxpayer through 2026. Section 2010(c)(3).

[9] *Estate of Purdue v. Commissioner*, T.C. Memo. 2015-249, in which the petitioners were represented by Montgomery Purdue PLLC members George W. Akers and Alan L. Montgomery.

[10] *See* Montgomery et al., "Family Partnerships: Lessons From *Estate of Purdue*," *Tax Notes Federal*, Oct. 16, 2023, p. 459.

Trust (PFT) agreement contained the same section 675 borrowing and substitution powers described in the JSGT article. The PFT was jointly created and equally funded with community property by Robert and Barbara Purdue but (unlike the JSGT) did not at any time own S corp stock. After Robert's death, Barbara continued to pay 100 percent of the income tax attributable to the PFT until her death. As provided by Rev. Rul. 2004-64, Barbara did not report as taxable gifts during her lifetime any of the income taxes she paid, including those attributable to Robert's transfer, on approximately $2 million of PFT taxable income that was distributed to the PFT beneficiaries between 2001 and 2007.[11]

Barbara's estate also did not report on its federal estate tax return any of the income taxes she paid on that PFT taxable income during her life, including those attributable to Robert's transfer, as adjusted taxable gifts that would have increased her estate tax liability. That reporting instead reflected that Barbara was the 100 percent deemed owner of the PFT under section 675, including the portion funded by Robert. By applying Rev. Rul. 2004-64, and assuming for illustration purposes a 35 percent income tax rate and 55 percent combined Washington state and federal estate tax rate for 2007, the section 675 estate tax savings total $385,000, $192,500 of which is attributable to Robert's transfer.[12]

Although the assumed $192,500 of section 675 estate tax savings attributable to Robert's transfer to the PFT is insignificant compared with the total alleged estate tax deficiency initially determined by the IRS,[13] it is relevant both here and for the JSGT article (see Section VII on *Estate of Purdue* below).

III. The Invalid 'Two-Calculations Requirement' Theory

In their letters to the editor of *Tax Notes Federal*, Jonathan G. Blattmachr, F. Ladson Boyle, and Howard M. Zaritsky (Blattmachr letter)[14] and Philip M. Lindquist (Lindquist letter)[15] offer opinions that, if applied to the *Estate of Purdue* reporting positions, would result in the halving of the assumed $385,000 of estate tax savings to only $192,500 and, if applied to the JSGT, would also result in unnecessary S corp reporting complications and additional reporting expense for surviving grantor W.

Without citing any relevant statute, regulation, revenue ruling, case law, or private letter ruling, and contrary to what is expressly provided in section 675, the other authors contend that, upon the death of the first grantor, surviving grantor Barbara (and surviving grantor W) can only be the deemed owner of the portion of the PFT (and the JSGT) attributable to their own transfers of property to the trusts (the two-calculations requirement).[16] We responded to the Blattmachr and Lindquist letters with our own letters to the editor.[17]

An article by Howard M. Zaritsky, professor Karen Elizabeth Boxx, Steven B. Gorin, and Ann T. Wilson (Zaritsky article)[18] also critiques the JSGT

[11] "From 2001 to 2007 the Purdue children received, in approximately equal shares, cash distributions totaling $1,997,304 in their capacities as PFT beneficiaries." *Estate of Purdue*, T.C. Memo. 2015-249, at 258.

[12] Although Robert's original 50 percent contribution was diluted by later gifts Barbara made to the PFT after his death, it is assumed for illustration purposes in this article that his transfer was still 50 percent of the PFT at the death of Barbara. *Estate of Purdue*, T.C. Memo. 2015-249, at 257.

[13] "Respondent determined an estate tax deficiency of $3,121,959 with respect to the Estate of Barbara M. Purdue." *Estate of Purdue*, T.C. Memo. 2015-249, at 257.

[14] Jonathan G. Blattmachr, F. Ladson Boyle, and Howard M. Zaritsky, "Grantors Cannot Override the Grantor Trust Rules," *Tax Notes Federal*, Apr. 25, 2022, p. 619.

[15] Philip M. Lindquist, "Invitation Accepted: Weighing In on the Grantor Trust Rules," *Tax Notes Federal*, July 25, 2022, p. 567.

[16] "Two calculations" refers to the two-step arguments made in both the Blattmachr letter, *supra* note 14, and the Lindquist letter, *supra* note 15.

[17] Montgomery et al., "Authors' Response to Blattmachr, Boyle, and Zaritsky," *Tax Notes Federal*, May 2, 2022, p. 751, and Montgomery et al., "Authors Respond to Philip M. Lindquist's 'Two Calculations' Theories," *Tax Notes Federal*, Aug. 1, 2022, p. 738.

[18] Zaritsky, et al., "Can a Surviving Spouse Own a Grantor Trust?" 50 *Est. Plan.* 8 (Nov. 2023).

article,[19] and separate materials by Gorin (Gorin materials)[20] similarly critique the JSGT article.[21] The Zaritsky article and Gorin materials, both of which contain analysis that conflicts with the language of section 675, conclude that a grantor of a section 675 trust cannot be the deemed owner of the portion of a trust that is attributable to the transfer of property made by another grantor of that same trust. We must continue to respectfully disagree with those opinions.

IV. The Blattmachr Letter

Why the authors of the Blattmachr letter, all accomplished lawyers, would promote a fiction that thwarts the objectives discussed in Section II and misleads tax practitioners about the applicable law is a mystery. Our duty as tax practitioners is to give clients reliable advice that conforms to applicable law, rather than give them questionable advice based on the inaccurate personal beliefs of other (albeit well-known) practitioners that conflict with applicable law. For that reason, readers should be skeptical of the opinions stated in the Blattmachr letter. We strongly encourage them to begin their own analysis with the words that are actually in section 675, which will not mislead them.

The question asked at the beginning of this article can be answered directly by section 675(2) (defining the borrowing power),[22] which provides:

> The grantor shall be treated as the owner of *any portion of a trust* in respect of which . . . a power exercisable by the grantor or a nonadverse party, or both, . . . enables the grantor to borrow the corpus or income, directly or indirectly, without adequate interest or without adequate security. [Emphasis added.]

The phrase "any portion of a trust" in section 675 cannot be read more than one way. "Any portion of a trust" is obviously not the same as "the portion of the trust contributed by the grantor." It is a phrase that is modified only by the borrowing power language. Section 675 contains no language requiring "any portion of a trust" to first be determined with reference to the relative amount of the property contributed by that grantor to a trust that has multiple grantors. The only thing section 675(2) expressly requires is to determine that portion of the trust to which a grantor's retained borrowing power extends. As a result, under section 675(2), so long as a grantor who created the trust makes a gratuitous transfer of property to the trust, that person will be either a concurrent or sole deemed owner of the portion of the trust over which that grantor has retained the borrowing power, without regard to whether that grantor entirely funded that portion of the trust.

This unambiguous language in section 675 is all that is necessary to conclude that W is the 100 percent deemed owner of the JSGT following the death of H, including the portion funded by H. The plain meaning of that statutory language shows there is no two-calculations requirement and that the two-calculations underlying premise that "a grantor cannot be the deemed owner of another grantor's transfer of property" is untrue. Those last two fictions are the Blattmachr letter authors' personal opinions based on (1) an apparent belief that the common law meaning of the section 675 word "grantor" is different from the current two-part grantor definition provided in reg. section 1.671-2(e)(1) and (2) the dubious

[19] Citing the JSGT article, the Zaritsky article says: "Two recent articles suggest that a married couple can create a joint grantor trust of which each spouse is a deemed owner and of which the surviving spouse is the deemed owner of the entire trust (a spousal grantor trust). The authors respectfully disagree and contend that the tax law requires that each spouse be deemed to own as grantor only that portion of the trust that is attributable to his or her contributions to the trust, whether or not both spouses are alive. . . . The authors recommend that practitioners be wary about planning based on a contrary position." *Id.* at 3.

[20] *See also* Gorin, "Who Is the Grantor," Section III.B.2.h.i. in "Structuring Ownership of Privately-Owned Businesses: Tax and Estate Planning Implications" (Sept. 27, 2023).

[21] Citing the JSGT article in footnote 6578, the Gorin materials, *id*, say: Montgomery and Montgomery, "The Joint and Survivor Grantor Trust and the S Election," Tax Notes Federal, Vol. 174 (3/28/2022), starting at 1818, makes this error. In a letter dated April 15, 2022 Blattmachr, Boyle, and Zaritsky called out this error in a Letter to the Editor, Tax Notes Federal, Vol. 175 (4/25/2022), starting at 1818, but the authors rejected that letter's conclusion in a Response, Tax Notes Federal, Vol. 175 (5/2/2022), starting at 751. Of course, Blattmachr, Boyle, and Zaritsky were correct, but they might have been more persuasive had they mentioned how Examples (7) and (8) work together. Readers rely on the article at their peril.

[22] The "any portion" phrase also applies for purposes of the section 675(4)(C) substitution power.

view that the common law definition, if different, should override the grantor definition provided by regulation.

A. The Misreading of Reg. Section 1.671-3

The Blattmachr letter attributes the two-calculations requirement not to the primary authority, section 675, but to reg. section 1.671-3, as follows:

> This approach is also confirmed by reg. section 1.671-3, which discusses the portion of a trust that is deemed owned by each of multiple grantors. Multiple grantors of a grantor trust will each own a share of the whole trust. *The portion deemed owned by each grantor is based first on what part of the trust is attributable to the contributions by each grantor. Only then does the existence of a grantor trust power become relevant*.[23] [Emphasis added.]

The italicized sentences are a fabrication — words the authors made up to conform to their unsubstantiated personal beliefs that W is not the 100 percent deemed owner of the JSGT following H's death. There is no such principle stated in section 675, reg. section 1.671-3, or in any other statute or regulation, revenue ruling, case law, or private letter ruling dealing with a section 675 trust. The authors' contention that "the portion deemed owned by each grantor is based first on what part of the trust is attributable to the contributions by each grantor" is untrue, yet for reasons unknown, they attempt to mislead readers into believing it is valid. As demonstrated below, the language of section 675, the two-part regulation definition of grantor, and the other applicable regulations show that the conclusion of the other authors, italicized above, is incorrect.

B. Section 679 Language Does Not Apply to Domestic Trusts

While the made-up words do not exist in section 675, words similar to them are found only in section 679(a)(1):

> A United States person who directly or indirectly transfers property to a foreign trust . . . shall be treated as the owner for his taxable year of *the portion of such trust attributable to such property*. [Emphasis added.]

The absence in section 675 of words similar to those in section 679(a)(1) will be construed by the courts as Congress intended. If, when section 679(a)(1) was enacted, Congress thought its "portion of such trust attributable to such property" principle should also apply to section 675, it would have amended section 675 to say so at that time.[24]

C. The Blattmachr Letter Authors Do Not Believe in the Reg. Section 1.671-2(e)(1) Two-Part Definition of Grantor

The untrue "a grantor cannot be the deemed owner of another grantor's transfer of property" premise of the two-calculations requirement theory is instead based on an unwillingness to believe that the creator grantor definition in reg. section 1.671-2(e)(1) means what it says. That regulation provides two methods by which a person may become a grantor:

> For purposes of part I of subchapter J, chapter 1 of the Internal Revenue Code, a grantor includes any person to the extent such person either [1] creates a trust or [2] directly or indirectly makes a gratuitous transfer . . . of property to a trust. . . . However, a person who creates a trust but makes no gratuitous transfers to the trust is not treated as an owner of any portion of the trust under sections 671 through 677 or 679. [Bracketed numerals added.]

Reg. section 1.671-2(e)(1) and Example 1 of reg. section 1.671-2(e)(6) both distinguish grantors like H and W (creator grantors) from grantors who make gratuitous transfers only (transfer-only grantors):

[23] Blattmachr letter, *supra* note 14.

[24] "Where specific language is included in one section of a statute but omitted from another, related section of the same Act, it is generally presumed that the omission was intentional." *Tesoro Hawaii Corp. v. United States*, 405 F.3d 1339, 1347 (Fed. Cir. 2005).

> A creates and funds a trust, T, for the benefit of her children. B subsequently makes a gratuitous transfer to T. Under paragraph (e)(1) of this section, both A and B are grantors of T.

A primary distinction between a creator grantor and a transfer-only grantor is that a creator grantor may retain section 675 powers over an entire trust. For example, reg. section 1.671-2(e)(6), Example 3, makes it clear that the act of trust creation is separate and apart from the mere funding of the trust. In Example 3, creator grantor A is acknowledged to be capable of retaining section 675 powers over the entire trust FT, even though A is not treated as transferring any property to FT and there is another grantor of the trust (B, who is a transfer-only grantor):

> A, an attorney, creates a foreign trust, FT, on behalf of A's client, B, and transfers $100 to FT out of A's funds. A is reimbursed by B for the $100 transferred to FT. . . . *Both A and B are treated as grantors of FT under paragraph (e)(1) of this section*. . . . A is not an owner of any portion of FT under sections 671 through 677 *regardless of whether A retained any power over or interest in FT described in sections 673 through 677*. [Emphasis added.]

The ability of a creator grantor to retain section 675 powers over an entire trust, which (so long as the grantor also makes a gratuitous transfer of property to that trust) results in that grantor being its concurrent or sole deemed owner without regard to whether that grantor funded the entire trust, is also acknowledged in reg. section 1.671-2(b), which provides:

> The principle underlying subpart E (section 671 and following), part I, subchapter J, chapter 1 of the Code, is in general that income of a trust over which the grantor . . . has retained substantial dominion or control should be taxed to the grantor.

Like section 675 and reg. section 1.671-3, reg. section 1.671-2(b) does not contain any language making the relative sizes of the portions of a trust funded by multiple creator grantors relevant to the determination of its deemed ownership. That would require inserting this italicized paraphrased version of the Blattmachr letter's fabricated words, which obviously are not actually there, into reg. section 1.671-2(b), as follows:

> The principle underlying subpart E (section 671 and following), part I, subchapter J, chapter 1 of the Code, is in general that income of a trust over which the grantor . . . has retained substantial dominion or control should be taxed to the grantor. [*For a trust with multiple grantors, the portion deemed owned by each grantor is based first on what part of the trust is attributable to the contributions by each grantor. Only then does the retained substantial dominion or control become relevant*.] [Emphasis added.]

Since the bracketed and italicized language is not in reg. section 1.671-2(b), only by disregarding the creator grantor part of the two-part regulations definition of grantor can reg. section 1.671-2(b) be reconciled with the Blattmachr letter's conclusion that grantors H and W can only be the deemed owners of the JSGT to the extent of their own transfers to the JSGT. For that conclusion to be valid, the creator grantor definition must be entirely omitted from the two-part reg. section 1.671-2(e)(1) definition so that only its second part (the transfer-only grantor definition as described in the JSGT article) counts, as follows:

> For purposes of part I of subchapter J, chapter 1 of the Internal Revenue Code, a grantor includes any person to the extent such person . . . directly or indirectly makes a gratuitous transfer . . . of property to a trust.

D. Example 7 of Reg. Section 1.671-2(e)(6)

Using two sample calculations, Variation 1 and Variation 2, the JSGT article applied Example 7 of reg. section 1.671-2(e)(6) in reaching the conclusion that W is the 100 percent deemed owner of the JSGT following the death of H. In conjunction with the two-part reg. section 1.671-2(e)(1) grantor definition, Example 7 provides that one grantor of a section 675 trust may be a deemed owner of the portion of the trust funded by another grantor of the same trust, so long as the

section 675 powers retained by the first grantor extend to the entire trust:

> A, B's brother, creates a trust, T, for B's benefit and transfers $50,000 to T. The trustee invests the $50,000 in stock of Company X. C, B's uncle, purportedly sells property with a fair market value of $1,000,000 to T in exchange for the stock when it has appreciated to a fair market value of $100,000. Under paragraph (e)(2)(ii) of this section, the $900,000 excess value is a gratuitous transfer by C. Therefore, under paragraph (e)(1) of this section, *A is a grantor with respect to the portion of the trust valued at $100,000, and C is a grantor of T with respect to the portion of the trust valued at $900,000. In addition, A or C or both will be treated as the owners of the respective portions of the trust of which each person is a grantor if A or C or both retain powers over or interests in such portions under sections 673 through 677*. [Emphasis added.]

Grantor A in Example 7 satisfies both parts of the reg. section 1.671-2(e)(1) grantor definition. Grantor A is both (1) a creator grantor capable of retaining section 675 powers over the entire trust T and (2) a transfer grantor of the portion of trust T attributable to grantor A's own contribution to trust T. As provided by the italicized last sentence of Example 7, if creator grantor A retains section 675 powers over the entire trust T, including the portion later funded by transfer-only grantor C, and C retains no grantor trust powers over any portion of trust T, then grantor A is the sole deemed owner of the entire trust T, including the portion funded by transfer-only grantor C.

Under those assumed facts, that interpretation of the last sentence of Example 7 of reg. section 1.671-2(e)(6) reconciles the reg. section 1.671-2(e)(1) two-part grantor definition consistently with the words of the primary authority, section 675. Only by disregarding (1) the reg. section 1.671-2(e)(1) creator grantor definition and (2) the "any portion" language of section 675 itself can the Blattmachr letter authors conclude that grantor A is not the deemed owner of the portion of trust T attributable to grantor C's transfer of property to trust T.

V. The Lindquist Letter

Since the first part of reg. section 1.671-2(e)(1) (the definition of creator grantor) conflicts with the opinion that W is not the 100 percent deemed owner of the JSGT following H's death, the Lindquist letter substitutes an alleged (but nonexistent) "common law meaning of grantor" for the regulation's creator grantor definition in its description of the two-calculations requirement:

> there are two elements to the application of the grantor trust rules. . . . Under *the common law meaning of grantor*, these sections [671-677] only apply to the extent that the taxpayer contributed to the trust, which is the first element. Then the specific provisions of sections 673 to 677 specify the second element. [Emphasis added.]

The defect in Lindquist's reasoning is that even if the common law meaning of grantor validates his first element (the "a grantor cannot be the deemed owner of another grantor's transfer of property" premise) — which it does not, as described in Section VI on the *Bixby* case that follows — the reg. section 1.671-2(e)(1) two-part definition of grantor supersedes the common law anyway.[25]

VI. *Bixby*

Although the Lindquist letter contends that W cannot be the 100 percent deemed owner of the JSGT following H's death because of a universally accepted "common law meaning of grantor," the case law predating reg. section 1.671-2(e)(1) indicates Lindquist is incorrect.

In *Bixby*,[26] the transferors of $900,000 of property to seven irrevocable trusts were, under substance-over-form principles, determined to be the actual settlors of those trusts,[27] making them comparable to creator grantors described in the

[25] Courts have long applied the principle that when a statute or regulation defines a term, that definition governs and displaces common law or dictionary usage. *See Alaska Trojan Partnership v. Gutierrez*, 425 F.3d 620, 628 (9th Cir. 2005) ("When a statute or regulation defines a term, that definition controls.").

[26] *Bixby v. Commissioner*, 58 T.C. 757, 791 (1972).

[27] "We find that the individual petitioners were the settlors of the Bermuda trusts." *Id*.

first part of reg. section 1.671-2(e)(1) and the JSGT article. The transferor of $7,000 to those same trusts was determined to be a "settlor in form only,"[28] making him more comparable to a transfer-only grantor as described in the second part of reg. section 1.671-2(e)(1) and the JSGT article. Because the $900,000 transferors controlled the trusts,[29] the court determined that the $900,000 transferors were the deemed owners of 100 percent of the trusts under section 677(a) and section 671.[30] In other words, the $900,000 creator grantors were the deemed owners of the portion of the trusts attributable to the $7,000 transfer-only grantor's contribution to the trusts.

The *Bixby* result contradicts the Lindquist letter's claim that the common law provides a different answer to the question than what reg. section 1.671-2(e)(1) does and proves that the premise "a grantor cannot be the deemed owner of another grantor's transfer of property" was not true even before the promulgation of that regulation. If that premise were instead true, it would have required the portion of the *Bixby* trusts attributable to the $7,000 transfer-only grantor to instead be taxed separately to someone other than the $900,000 creator grantors, either under the grantor trust rules or alternatively under the non-grantor trust rules.

Though the preexisting common law is superseded by the two-part grantor definition in reg. section 1.671-2(e)(1) anyway, *Bixby* is still consistent with that two-part reg. section 1.671-2(e)(1) grantor definition, with the *Estate of Purdue* section 675 reporting positions and with the conclusions reached in the JSGT article that surviving grantor W is the 100 percent deemed owner of the JSGT following the death of H, including the portion attributable to H's transfer.

VII. *Estate of Purdue*

We encourage readers to consider the positive audit result in *Estate of Purdue*,[31] in which we represented the taxpayer. Regarding the PFT, an otherwise implacable IRS, which lost all four of the disputed issues in the Tax Court, still respected the express language of section 675 and the regulations that construe it. The examiner was an experienced senior agent, both a tax lawyer with an LLM and a CPA. He was thorough and uncompromising, with a reputation for asserting novel positions in estate tax return audits. If Robert's death had transformed the portion of the PFT attributable to his property transfer into a terminated grantor trust to which Rev. Rul. 2004-64 does not apply, then that especially knowledgeable and aggressive examiner should have increased the adjusted taxable gifts amount reported on the estate tax return to further increase the alleged federal estate tax deficiency amount. The potential value to the IRS of increasing adjusted taxable gifts on the estate tax return in that way, if there were a valid legal basis to do so, was many times more than the value of the insignificant $20,891 interest deduction that the IRS compelled the estate to litigate in the Tax Court.[32]

As tax planners, we concluded that, after Robert's death, Barbara was the deemed owner under section 675 of 100 percent of the PFT, including the portion attributable to Robert's transfer. As the return preparers, we took what the express language of section 675 unmistakably says are correct reporting positions on the gift and estate tax returns. Those positions resulted in the full assumed $385,000 estate tax savings, including the $192,500 attributable to Robert's transfer, to which the estate was entitled under Rev. Rul. 2004-64.

The *Estate of Purdue* planning and reporting was based primarily on the words of section 675 itself. We assumed section 675 means what it says when we concluded Barbara was the sole deemed owner of the PFT following Robert's death. The fact that the IRS did not question the section 675 reporting in *Estate of Purdue* is therefore good

[28] "The named settlor was settlor in form only." *Id.* at 829.

[29] "To us it is obvious that the entire transaction was designed to allow petitioners to maintain control over the property transferred." *Id.* at 827.

[30] "Furthermore, we hold that the annual payments represent amounts distributable without the consent or approval of an adverse party under section 677(a)(1). . . . *The petitioners are therefore taxable on the income of the trusts during 1961 as owners of those trusts under section 671*" (emphasis added). *Id.* at 829.

[31] *Estate of Purdue*, T.C. Memo. 2015-249.

[32] *Id.*

news for other tax practitioners who want to use a JSGT to postpone, until after the death of the surviving JSGT grantor, the possibility of inadvertent S terminations arising solely from the death of the first grantor and the unnecessary complication and expense of electing small business trust and qualified subchapter S trust reporting. Those practitioners can reasonably expect the IRS to interpret section 675 as written by Congress,[33] without inserting words that "obviously are not there" into that statute[34] or the regulations that construe it.[35] According to the Supreme Court, taxpayers can trust that section 675 means what it says and rely on it with confidence:

> When the meaning of the statute's terms is plain, our job is at an end. The people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration.[36]

VIII. The Zaritsky Article

The Zaritsky article's lead author, Howard M. Zaritsky, is also one of the authors of the Blattmachr letter. The Zaritsky article suffers from the same analytical flaws and misstatements of law as the Blattmachr letter. Its authors continue to maintain that there is a two-calculations requirement that prevents W from being the 100 percent deemed owner of the JSGT following H's death. Finding no validation for that in the words of section 675 itself, the authors unsuccessfully search for it in reg. section 1.671-3(a)(3), or alternatively in the reg. 1.671-2(e)(1) two-part definition of grantor.

A. The 'First Two Sentences' Argument

Just like in the Blattmachr letter, the Zaritsky article's authors attempt to insert made-up words into reg. section 1.671-3(a)(3):

> Thus, the first two sentences of Treas. Reg. 1.671-3(a)(3) require one first to determine the portion of the trust attributable deemed owned by each grantor, *based on the grantors' relative contributions*.[37] [Emphasis added.]

The words "based on the grantors' relative contributions" (or anything similar) are most certainly not included in the first two sentences of reg. section 1.671-3(a)(3),[38] which can be demonstrated with a side-by-side comparison. On the left are the first two sentences of reg. section 1.671-3(a)(3), and on the right is the Zaritsky article sentence with the fabricated words in italics.

"If the portion of a trust treated as owned by a grantor or another person consists of an undivided fractional interest in the trust, or of an interest represented by a dollar amount, a pro rata share of each item of income, deduction, and credit is normally allocated to the portion. Thus, where the portion owned consists of an interest in or a right to an amount of corpus only, a fraction of each item (including items allocated to corpus, such as capital gains) is attributed to the portion."	"Thus, the first two sentences of Treas. Reg. 1.671-3(a)(3) require one first to determine the portion of the trust attributable deemed owned by each grantor, *based on the grantors' relative contributions*" (emphasis added).

The validity of the Zaritsky article's legal reasoning, that there is a two-calculations requirement that prevents surviving grantor W from being the deemed owner of the portion of the JSGT attributable to H's transfer of property,

[33] "We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: "judicial inquiry is complete." *Connecticut National Bank v. Germain*, 503 U.S. 249, 254 (1992).

[34] Courts "cannot insert into statutes terms or provisions which are obviously not there." *Matter of Adoption of Chaney*, 887 P.2d 1061, 1065 (1995).

[35] "We construe a regulation in the same manner as we construe a statute, by ascertaining its plain meaning." *Tesoro Hawaii Corp.*, 405 F.3d 1339, 1346.

[36] *Kelly v. Commissioner*, T.C. Memo. 2023-126, citing *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731, 1749 (2020).

[37] Zaritsky article, *supra* note 18, at 5.

[38] "When there is no ambiguity in the meaning of the regulation, 'it is the duty of the courts to enforce it according to its obvious terms and not to insert words and phrases so as to incorporate therein a new and distinct provision.'" *Tesoro Hawaii Corp.*, 405 F.3d at 1343.

depends entirely on the meaning of the words in the left-side box. We disagree that the plain words in the left-side box have the same meaning as the italicized words in the right-side box. To the contrary, a plain-meaning interpretation of the language of the regulation shown in the left-side box shows quite clearly that the italicized words in the right-side box are no more in the left-side box than they are in section 675 itself.

1. The first sentence.

As an interpretive regulation,[39] the first sentence phrase "the portion of a trust treated as owned by a grantor," by application of the regulation preamble,[40] refers directly to the statutory terms "any portion," "owner," and "grantor" in section 675. The words "based on the grantors' relative contributions" or similar language are not found in section 675. The Zaritsky article's authors claim that the language they seek to insert into the regulation modifies the section 675 statutory phrase "any portion," thereby preventing one section 675 grantor from being the deemed owner of another section 675 grantor's transfer of property. But if the Zaritsky article's made-up language is not expressly stated in section 675 itself, then it cannot be inserted into section 675 by an incorrect interpretation of the first sentence of reg. section 1.671-3(a)(3) that is plainly inconsistent with the statute to which it relates.[41] The first sentence only provides that, when there are multiple deemed owners of a portion of a section 675 trust like the JSGT, the section 671 items are allocated proportionately among them. However, that first sentence does not say how that proportionate allocation is to be done (which is governed by the third sentence of the regulation) and most certainly does not require that it be "based on the grantors' relative contributions" to the trust.

2. The second sentence.

Since the invented words "based on the grantors' relative contributions" (or any other words approximating that concept) are absent from the first sentence of reg. section 1.671-3(a)(3), then the Zaritsky article's authors must believe that they are found in its second sentence:

> The second sentence says that one separately tests whether the portion owned is income or principal. The "subject to control" formula applies only with respect to the portion of the trust already attributable to the grantor, and then you multiply that by the formula.[42]

As is very evident, the words "based on the grantors' relative contributions" (or any other words approximating that concept) are no more present in the second sentence of reg. section 1.671-3(a)(3) than in its first sentence. Further, the fatal flaw in the Zaritsky authors' conclusion that surviving grantor W cannot be the deemed owner of H's transfer of property to the JSGT is that they attempt to insert the phantom "based on the grantors' relative contributions" phrase into the wrong sentence of reg. section 1.671-3(a)(3). It is, in fact, the third sentence of reg. section 1.671-3(a)(3) that determines whether two calculations or a single calculation are required to apportion the deemed ownership of the JSGT among its grantors H and W, not its irrelevant second sentence. The second sentence of reg. section 1.671-3(a)(3) does not apply to the JSGT at all because section 675 deemed ownership is not limited to "corpus only." Rather, reg. section 1.671-3(b)(3) says:

> A grantor or another person includes both ordinary income and other income allocable to corpus in the portion he is treated as owning if he is treated as an owner under section 675.

That makes reg. section 1.671-3(a)(1), not the second sentence of reg. section 1.671-3(a)(3), applicable to the JSGT:

> If a grantor . . . is treated as the owner of an entire trust (corpus as well as ordinary

[39] Congress grants Treasury broad rulemaking authority under section 7805(a) to promulgate "all needful rules and regulations" for the enforcement of the IRC.

[40] The reg. section 1.671-3(a) preamble applies to the entire section, including but not limited to reg. section 1.671-3(a)(3): "(a) When a grantor or another person is treated *under subpart E (section 671 and following) as the owner of any portion of a trust*, there are included in computing his tax liability those items of income, deduction, and credit against tax attributable to or included in that portion" (emphasis added).

[41] *California Cosmetology Coalition v. Riley*, 110 F.3d 1454, 1461 (9th Cir. 1997) ("A regulation which is 'plainly inconsistent' with the governing statute is invalid.").

[42] Zaritsky article, *supra* note 18, at 5.

> income), he takes into account in computing his income tax liability all items of income, deduction, and credit (including capital gains and losses) to which he would have been entitled had the trust not been in existence during the period he is treated as owner.

The phrase "if a grantor . . . is treated as the owner of an entire trust (corpus as well as ordinary income)" applies to H and W, and to the survivor of them. The third sentence of reg. section 1.671-3(a)(3) then provides for a single calculation (not two calculations) to apportion the section 671 items of the JSGT, 50 percent to each during their joint lifetimes and 100 percent to W after H's death. That is the only possible conclusion that can be reached by applying just these operative words of reg. section 1.671-3(a)(3) shown below that are actually relevant to section 675 trusts, as follows (with its irrelevant second sentence disregarded and its relevant third sentence italicized):

> If the portion of a trust treated as owned by a grantor [under section 675] . . . consists of an undivided fractional interest in the trust . . . a pro rata share of each item of income, deduction, and credit is normally allocated to the portion. . . . *The numerator of this fraction is the amount which is subject to the control of the grantor or other person and the denominator is normally the fair market value of the trust corpus at the beginning of the taxable year in question*. [Emphasis added.]

The Zaritsky article (like the Blattmachr letter and the Lindquist letter) insists there are two calculations (not one) to be derived from the underlined third sentence of reg. section 1.671-3(a)(3), the first of which is "based on the grantors' relative contributions." If so, two fractions must be defined in that third sentence, the first with a numerator of "the amount contributed by the grantor" and the second with a numerator of "the amount which is subject to the control of the grantor." But there is no second fraction defined there, only one, the numerator of which is "the amount which is subject to the control of the grantor."

It is, of course, impossible to insert the made-up words "based on the grantors' relative contributions" into that third sentence when it so unequivocally defines only a single fraction and there are, in fact, no such made-up words (or any other words approximating that concept) in that third sentence or in section 675 itself.

Both section 675 and the third sentence of reg. section 1.671-3(a)(3) mean what they say, and they plainly say there is no two-calculations requirement. That means Lindquist's "first element" does not exist, the Zaritsky article's claim that there is a hidden reg. section 1.671-3(a)(3) calculation that must be "based on the grantors' relative contributions" is false, and their premise that "a grantor cannot be the deemed owner of another grantor's transfer of property" is untrue.

Instead, since the deemed ownership of the multiple-grantor JSGT is allocated by section 675 and that third sentence of reg. section 1.671-3(a)(3) exclusively in proportion to the control retained rather than the property transferred and since H's retained control is extinguished by his death, W's sole continuing retained control over the entire JSGT thereafter makes W the deemed owner of 100 percent of the JSGT for life.

B. The 'Creator Grantor' Definition Only Applies to Foreign Trusts Argument

The Zaritsky article, like the Lindquist letter and the Gorin materials, misinterprets the preamble to the 1999 final regulations (T.D. 8831), seen below, that discuss a grantor who makes no transfer of property to a foreign trust:

> Under the original proposed regulations, a grantor was defined to include any person to the extent such person either (i) creates a trust or (ii) directly or indirectly makes a gratuitous transfer to a trust. Commenters questioned why a nominal creator who has made no transfer to a trust should be treated as a grantor and asked for an explanation of the tax significance of such treatment.
>
> *Treating a nominal creator as a grantor ensures that someone will be responsible for reporting the creation of a foreign trust by a U.S. person even if the trust is not immediately*

> *funded. See section 6048(a)(3)(A)(i) and (a)(4)(A).* At the same time, Treasury and the IRS believe that an accommodation grantor, such as an attorney who creates a trust on behalf of a client, (although a grantor) should not be treated as an owner of the trust. Accordingly, the temporary regulations provide that *a person who* either *creates a trust*, or funds a trust with an amount that is directly repaid to such person within a reasonable period of time, *but who makes no other transfers to the trust that constitute gratuitous transfers, will not be treated as an owner of any portion of the trust under sections 671 through 677 or 679*. [Emphasis added.]

Since the T.D. 8831 preamble discusses a specific application of the two-part grantor definition to unfunded foreign trusts in the italicized language closer to the top, the other authors suggest that the creator grantor portion of the reg. 1.671-2(e)(1) definition of grantor should apply only to foreign trusts[43] and not to section 675 trusts.[44] That suggestion directly contradicts the reg. section 1.671-2(e)(1) preamble that makes the creator grantor definition expressly applicable for all grantor trust purposes, including section 675.[45] It also fails to acknowledge reg. section 1.671-2(e)(1), Example 4, which applies to domestic trusts: "B is not a grantor of [Domestic Trust] T under paragraph (e)(1) of this section because B *neither created* T *nor made a gratuitous transfer* to T" (emphasis added).[46]

C. The 'Exception Swallows the Rule' Argument

The Zaritsky article (like the Blattmachr letter, the Lindquist letter, and Gorin materials)[47] alternatively claims that the two-calculations requirement is instead implied from the exception to the reg. section 1.671-2(e)(1) two-part grantor definition itself.[48] In support of that argument, the authors refer to the italicized language above that is closer to the bottom of the T.D. 8831 preamble quoted in subsection B directly above, discussing grantors who make no transfer of property at all to a domestic trust. Their illogical conclusion is that, since a grantor who makes no transfer of property at all to a domestic trust cannot be a deemed owner, then their "a grantor cannot be a deemed owner of another grantor's transfer of property" premise must be true:

> The comprehensive reading of Treas. Reg. 1.671-3(a)(3) is consistent with the statements in Treas. Reg. 1.671-2(e)(1) that "a person who creates a trust but makes no gratuitous transfers to the trust is not treated as an owner of any portion of the trust under" the grantor trust rules and that "a person who funds a trust with an amount that is directly reimbursed to such person within a reasonable period of time and who makes no other transfers to the trust that constitute gratuitous transfers is not treated as an owner of any portion of the trust under" the grantor trust rules. *These statements require that the deemed ownership of a trust or trust portion be limited to those who provided the funds for that trust or trust portion*.[49] [Emphasis added.]

Although the exception to reg. section 1.671-2(e)(1) unquestionably provides that a grantor who makes no gratuitous transfer at all to a trust cannot be a deemed owner of the trust,[50] the converse of that exception (that is, a grantor who does make a gratuitous transfer to a trust may be

[43] Zaritsky article, *supra* note 18, at 5. ("This distinction is best understood in light of the background of these regulations. Reg. section 1.671-2(e) was added in 2000, in response to changes made by the Small Business Job Protection Act of 1996 in Sections 672(f), 643(h), and certain other sections. . . . These changes related primarily to foreign trusts.").

[44] Even T.D. 8831 itself confirms its discussion is not limited to foreign trusts: "A person . . . who *makes no other transfers to the trust that constitute gratuitous transfers*, will not be treated as an owner of any portion of the trust *under sections 671 through 677 or 679*" (emphasis added).

[45] Reg. section 1.671-2(e)(1) says, "For purposes of part I of subchapter J, chapter 1 of the Internal Revenue Code, a grantor includes any person to the extent such person . . . creates a trust."

[46] The Gorin materials, *supra* note 20, and the Lindquist letter, *supra* note 15, similarly misinterpret T.D. 8831 without acknowledging these contradictions.

[47] *See* response to Blattmachr, *supra* note 17.

[48] Zaritsky article, *supra* note 18, at 5.

[49] *Id.* at 7.

[50] The reg. section 1.671-2(e)(1) exception is that "a person who creates a trust but makes no gratuitous transfers to a trust is not treated as an owner of any portion of a trust under sections 671 through 677 or 679."

a deemed owner of that trust) is the general rule.[51] Since H and W jointly created and equally funded the entire JSGT, the exception is inapplicable, the general rule applies instead, and their retained borrowing and substitution powers make them, and the survivor of them, the deemed owners of the entire JSGT under section 675.

D. The 'Triple Taxation' Argument

The Zaritsky article also claims that the JSGT article analysis will lead to double or triple taxation, depending on the number of grantors who are the concurrent deemed owners of the same portion of the section 675 trust:

> Determining deemed ownership by only the formula portion of Treas. Reg. 1.671-3(a)(3), however, would cause each grantor to be individually taxable on 100 percent of the trust income, deduction, gains, and losses; it would cause the entire trust income, deduction, gains, and losses to be double-taxed. . . . [Footnote 33: If there were three grantors in this example, the trust income, deduction, gains, and losses would be triple taxed. And so forth.] This result would be absurd and unjust and could not have been intended by Treasury, the IRS, or Congress.[52]

The defined fraction of the third sentence of reg. section 1.671-3(a)(3) applied in the manner shown in the JSGT article ensures just the opposite. Reg. section 1.671-3(a)(3) first expressly confirms that multiple grantors can be concurrent deemed owners of the same portion of a section 675 trust and then provides for pro rata apportionment of the section 671 tax items among them, according to the section 675 powers retained by them. The application of reg. section 1.671-3(a)(3)'s pro rata apportionment of the JSGT tax items therefore ensures that 100 percent (no more and no less) of each of those tax items is allocated equally to H and W while both are living, and 100 percent to surviving grantor W, according to their retained borrowing and substitution powers. For the Zaritsky article to suggest the fraction defined in the third sentence of reg. section 1.671-3(a)(3) applied in the JSGT article results in double or triple taxation is absurd.[53]

E. The 'Abusive and Unintended' Argument

The Zaritsky article, when referring to the defined fraction in the third sentence of reg. section 1.671-3(a)(3), says:

> The expansive reading of the formula also produces an absurd result where grantors contribute significantly different amounts to the trust. For example, Grantor A contributes $10 and Grantor B contributes $1 million to Trust. Each grantor retains the right to reacquire the entire trust fund by substituting assets of equivalent value. A literal reading of the formula in the regulations would make each grantor the deemed owner of the entire trust for income tax purposes while both are alive. Making Grantor A the deemed owner of the entire trust because of a $10 contribution seems an abusive and unintended application of the concept of fractional share formulae.[54]

This is not a serious argument, because any contrived or insubstantial transfer of property (like $10), made for the primary purpose of tax avoidance, may, under substance-over-form principles, prevent grantor A from being the deemed owner of the entire trust.[55] In any event, the $10 transfer example obviously does not apply to H and W, who jointly created and equally funded the entire JSGT. Although there may be incidental tax benefits for some S corp owners, H and W's primary non-tax-avoidance purpose for

[51] The reg. section 1.671-2(e)(1) general rule is that "for purposes of part I of subchapter J, chapter 1 of the Internal Revenue Code, a grantor includes any person to the extent such person either creates a trust or directly or indirectly makes a gratuitous transfer . . . of property to a trust."

[52] Zaritsky article, *supra* note 18, at 5-6.

[53] Language in a statute or regulation should not be construed in a manner that yields an absurd or obviously unintended result. *Yim v. City of Seattle*, 63 F.4th 783 (9th Cir. 2023).

[54] Zaritsky article, *supra* note 18, at 7.

[55] A transfer of property made for the primary purpose of tax avoidance, generally "can be ignored . . . on the familiar tax principle that substance predominates over form" (internal references omitted). *Schulz v. Commissioner*, 686 F.2d 490, 496 (7th Cir. 1982); *CIM Trust v. Commissioner*, T.C. Memo. 2001-172 ("The primary purpose of the Morrows in establishing the trust was to avoid employment tax."). *See Bixby*, 58 T.C. 757 ("The named settlor was settlor in form only.").

the JSGT is the continuation of S corp shareholder eligibility under section 1361(c)(2)(A)(i) until after the death of the surviving grantor.[56]

F. The 'Old Law and Community Property' Arguments

The Zaritsky article cites *Dick H. McKenzie Family Estate*[57] and LTR 9304017, both of which are also cited in the JSGT article. We agree practitioners should not base their planning and reporting positions on older cases and letter rulings that were superseded or rendered obsolete by the reg. section 1.671-2(e)(1) two-part grantor definition. That old law was cited in the JSGT article only because it is consistent with its conclusion, not because it is necessary to its conclusion (which of course it is not). The conclusion that W is the 100 percent owner of the JSGT following the death of H is based on the language of section 675 and the related regulations themselves, without regard to older cases and private letter rulings that predate reg. section 1.671-2(e)(1).

The Zaritsky article contains community property law analysis that also does not support its conclusion that W cannot be the 100 percent deemed owner of the JSGT after the death of H. The community or separate property distinction is not relevant for purposes of the borrowing power,[58] the retention of which (without regard to the substitution power) is all that is necessary for W to be the deemed owner of 100 percent of the JSGT for life.

IX. The Gorin Example 8 Argument

The Gorin materials' critical error is that they conflate "grantor" with "deemed owner" when citing reg. section 1.671-2(e)(6), Example 8, in support of its argument that W cannot be the 100 percent deemed owner of the JSGT following H's death:

> Any suggestion that a trust deemed owned by more than one grantor is treated as owned 100 percent by the surviving grantor when one of the grantors dies is wrong because it contradicts Example (8), which continues a person's status *as the grantor* after that person dies.[59] [Emphasis added.]

The Gorin materials do not explain why Gorin believes that the JSGT article's conclusion (that W is the 100 percent owner of the JSGT following H's death) contradicts reg. section 1.671-2(e)(6), Example 8. Although the JSGT grantor status of H and W continues after their deaths, surviving grantor W's deemed ownership of the JSGT expires at W's death, after which time there is no longer any grantor who is then the deemed owner of the JSGT.[60] Thus, if H and W from the JSGT article (both of whom jointly retain the borrowing and substitution powers over the entire JSGT for life) are substituted for G in that Example 8, then the conclusion of the JSGT article is easily reconciled with Example 8 as follows:

> *Reg. section 1.671-2(e)(6), Example* 8 [adapted to the JSGT article facts]. H and W jointly create and equally fund a trust, T1, for the benefit of their children and grandchildren, subject to retained joint and survivor powers described in section 675 over T1 until the death of the survivor of H and W. After the deaths of H and W, under authority granted to the trustees in the trust instrument, the trustees of T1 transfer a portion of the assets of T1 to another trust, T2, and retain a power to revoke T2 and revest the assets of T2 in T1. Under paragraphs (e)(1) and (5) of this section, H and W are the grantors of T1 and T2. H and W, and the survivor of them, are the owners of T1 under section

[56] *See* response to Lindquist, *supra* note 17, at n.19.

[57] *Dick H. McKenzie Family Estate*, T.C. Memo. 1984-9.

[58] Section 675(2) provides: "The grantor shall be treated as the owner of any portion of a trust in respect of which — A power exercisable by the grantor or a nonadverse party, or both, enables the grantor to borrow the corpus or income, directly or indirectly, without adequate interest or without adequate security."

[59] Gorin materials, *supra* note 20, at 145 of 267. The curious quote might be just a preliminary idea: "The author refers to this document not as a 'treatise' or 'book' but rather as his 'materials,' because the author views this as a mere compilation of preliminary ideas (albeit a large compilation) and not as a scholarly work."

[60] Reg. section 1.671-2(e)(6), Example 8, itself explains that a trust (T1) is the owner of another trust (T2) only because there is, at the time of the transfer from T1 to T2, no grantor who also is the deemed owner of T1 or T2: "After G's death . . . G is the grantor of T1 and T2. In addition . . . T1 is treated as the owner of T2."

675. In addition, because the trustees of T1 have retained a power to revest the assets of T2 in T1, T1 is treated as the owner of T2 under section 678(a).

X. There Is No Two-Calculations Requirement

None of the conclusions reached in the Blattmachr letter, the Lindquist letter, the Zaritsky article, or the Gorin materials based on those flawed arguments and misstatements of law are valid. But more to the point, as described in the JSGT article, all the definitions necessary to determine the deemed ownership of the JSGT under section 675 are provided by code sections and regulations. None of the other authors makes a coherent argument for why the superseded or otherwise irrelevant cases cited in the Zaritsky article are necessary for practitioners or the courts to answer the question posed at the beginning of this article, when that answer can be derived exclusively from those code sections and regulations themselves. In particular, the question may be fully answered by (1) section 675, (2) reg. section 1.671-2(e)(1), and (3) reg. section 1.671-3(a), which when consistently applied, validate the conclusion that W is the 100 percent deemed owner of the JSGT following the death of H.

The Zaritsky article cites more than 50 superseded or irrelevant case law decisions, none of which hold that a creator grantor, like W, cannot be the deemed owner of the portion of a section 675 trust, like the JSGT, that is attributable to the other grantor H's transfer of property. A more relevant case is the 2014 post-reg. section 1.671-2(e)(1) *Close*,[61] in which the Tax Court unsurprisingly interpreted section 675 deemed ownership to be based solely on the power retained rather than the property transferred:

> For purposes of the grantor trust provisions, IRC sections 671-679, a "grantor" includes any person to the extent that person either creates a trust or gratuitously transfers property, directly or indirectly, to a trust. . . . The grantor of a trust is taxed on the income of the trust under the grantor trust provisions if any of the following conditions are met . . . certain administrative powers are exercisable by the grantor or a nonadverse party, IRC section 675.[62] [Internal references omitted.]

The *Close* interpretation indicates that practitioners can also reasonably expect the Tax Court to interpret section 675 as written by Congress, without inserting words into it, or into the regulations that construe it, that obviously are not there.

For these reasons, we concluded in our response to the Blattmachr letter that the two-calculations requirement is imaginary and in our response to the Lindquist letter that it is "a mistaken assumption unsupported by any identifiable authority." Nothing in the Zaritsky article causes us to change those conclusions. There is no two-calculations requirement, which exists only in the imaginations of its proponents. Readers can see with their own eyes that its underlying premise ("a grantor cannot be the deemed owner of another grantor's transfer of property") is untrue because section 675 itself so clearly says so. It is a fiction that conforms to a preconceived fallacious assumption in which the reg. section 1.671-2(e)(1) creator grantor definition has no place. Instead of believing that the two-part reg. section 1.671-2(e)(1) definition of grantor means what it says, the other authors instead choose to believe that a nonexistent "common law meaning of grantor" overrides a valid regulation that supersedes common law.

The two-calculations requirement is a dangerous myth that may result in otherwise avoidable S corp reporting complications and a potential loss of gift and estate tax savings for all who unwisely believe in it. By the harmonious application of section 675, reg. section 1.671-2(e)(1) and reg. section 1.671-3(a), the JSGT avoids S corp reporting complications and potential lost tax savings for S corp owners, so long as surviving grantor W is alive.

XI. The Ruling Request

Based on substantially the same facts and analysis in the JSGT article, we requested the

[61] *Close v. Commissioner*, T.C. Memo. 2014-25.

[62] *Id.* at 31-32.

following private letter rulings for a client trust (Trust) that is also a JSGT established by a married couple (Trustors) in Washington state, both of whom are presently living:

> During the joint lifetimes of the Trustors and until the death of the surviving Trustor:
>
> 1. the entire Trust will be treated under section 675(2) and/or section 675(4)(C) as wholly owned by both Trustors or the surviving Trustor;
> 2. the entire Trust will be an eligible S corporation shareholder described in IRC section 1361(c)(2)(A)(i); and
> 3. no portion of the Trust will be a terminated grantor trust described in IRC section 1361(c)(2)(A)(ii) upon the death of the first Trustor.[63]

Appended to the letter ruling request were copies of the Blattmachr letter, the response to Blattmachr, the Lindquist letter, and the response to Lindquist.

The letter ruling request explained the need for guidance for all similarly situated taxpayers about how the deemed-owner rules apply to a multiple-grantor trust that owns S corp shares "to help prevent unnecessary requests for relief from illusory inadvertent S election terminations arising from the mistaken belief in the invalid Blattmachr, Boyle, Zaritsky and Lindquist two calculations requirement theory."

Without explaining its decision in writing, the IRS declined to issue any ruling, adverse[64] or otherwise. That is significant because by declining to validate the two-calculations requirement, the IRS tacitly rejected it. If the IRS agrees with the other authors that there is a two-calculations requirement that prevents the surviving Trustor from being the 100 percent deemed owner of the entire Trust, then it should have issued an adverse ruling, just like it should have increased adjusted taxable gifts in the *Estate of Purdue* estate tax return audit to further increase the alleged estate tax deficiency. The fact that the IRS did not do so in either situation indicates that it intends to apply section 675 in tax return audits according to the section's plain terms without inserting made-up words into it that obviously are not there.

XII. Possible Alternative IRS Guidance

In a March 26, 2024, phone call with the authors, the IRS's representative was unwilling to provide any substantive comments about the ruling request and would only say that the IRS believed that a private letter ruling was not the best way to provide the requested guidance.

However, the IRS's representative did say the analysis provided in the ruling request (the JSGT article, the Blattmachr letter, the response to Blattmachr, the Lindquist letter, and the response to Lindquist) would be further considered for possible alternative action. We are thus providing copies of the Zaritsky article and this article to our ruling request contact at the IRS for further consideration as well.

It would not take much for the IRS to provide additional guidance for how the deemed-owner rules apply to a multiple-grantor trust that owns S corp shares. Reg. section 1.1361-1(h)(3)(i)(A) provides that "if stock is held by a qualified subpart E trust, the deemed owner of the trust is treated as the shareholder," and reg. section 1.1361-1(h)(1)(ii) provides that the death of the deemed owner results in the commencement of the two-year period during which the terminated subpart E trust remains temporarily qualified to be an S shareholder:

> (ii) *Subpart E trust ceasing to be a qualified subpart E trust after the death of deemed owner.* A trust that was a qualified subpart E trust immediately before the death of the deemed owner and that continues in existence after the death of the deemed owner, but only for the 2-year period beginning on the day of the deemed owner's death.

[63] *See* section 1361(c)(2)(A)(i) (a subpart E grantor trust may be an eligible S corp shareholder); reg. section 1.1361-1(h)(3)(i)(A) ("If stock is held by a qualified subpart E trust, the deemed owner of the trust is treated as the shareholder."); and reg. section 1.1361-1(e)(2) ("If husband and wife are owners of a subpart E trust, they will be treated as one individual.").

[64] We were not overly concerned about the possibility of an adverse ruling because that would eventually lead to a judicial answer to the question when asserted by the IRS in tax return audits. An IRS "no ruling" response enables the IRS to avoid providing any comment on the legal analysis governing the issue, foreclosing the opportunity to challenge an adverse position. For a discussion of strategic adverse letter ruling requests, see, *e.g.*, Noah Hertz Marks, "Winning by Losing: The Strategy of Adverse Private Letter Rulings," 66 *B.C. L. Rev.* 659 (2025).

Whether by private letter ruling or otherwise, the IRS could help clarify reg. section 1.1361-1(h)(1)(ii) with one or more examples, such as:

> H and W jointly create and equally fund a trust, T1, for the benefit of their children and grandchildren, subject to retained joint and survivor powers described in section 675 over T1 that do not terminate until the death of the survivor of them. For purposes of reg. section 1.1361-1(h)(1)(ii), H and W, and the survivor of them, are the deemed owners of T1 during their joint lifetimes, and the 2-year period does not commence until the death of the survivor of them.

XIII. Consider Applying for Your Own Ruling

Because the complications and potential damages arising from incorrect reporting positions can be substantial, tax practitioners should consider seeking their own private letter rulings for clients in appropriate cases. The submission of more ruling requests that are similar to ours might encourage the IRS to either issue a ruling or provide more formal guidance by alternative means.

For those who might find it helpful, a redacted copy of our ruling request can be downloaded from our website[65] or requested directly from the authors.

XIV. Conclusion

Similar to the rules in many other states, the Washington Rules of Professional Conduct 1.1 imposes the duty of competence in the representation of clients, and Rules of Professional Conduct 1.4 imposes the duty to communicate sufficiently so clients can make informed decisions about their representation.

The majority of the 5.1 million (and growing) S corps out there are smaller businesses whose owners may not be wealthy enough to pay federal estate taxes. But for those that are, practitioners confronted with the planning and reporting decisions described in the *Estate of Purdue* section above must first apply the applicable code sections and regs correctly to satisfy their duty of competence and then demonstrate that their clients understood them to satisfy their communication duty.

If the PFT income taxes paid by Barbara Purdue were reported on her gift and estate tax returns as the other authors suggest, the Purdue estate would lose $192,500 of assumed estate tax savings. The decision about whether to halve the estate tax savings to $192,500 is for the client to make, not the practitioner. If practitioners cannot establish both competence in their representation and an informed decision by their clients, the risk of possible damage claims is higher, along with related bar association complaints. Those risks can be avoided if the code and regs are applied according to their express terms, without trying to insert words into them that obviously are not there.

A practitioner's misguided belief in a legal myth like the nonexistent two-calculations requirement, that conflicts with rather than conforms to the applicable code and regs and that is not sufficiently disclosed so the client can make an informed decision to avoid damages, inevitably increases those risks.

We believe our prior JSGT article and this article are well-reasoned applications of the plainly written, unambiguous, and controlling language of section 675 and the regulations. We also believe our experiences with the *Estate of Purdue* estate tax return audit and our private letter ruling request demonstrate that the IRS evidently has no plans to assert in tax return audits that a grantor of a section 675 trust cannot be the deemed owner of another grantor's transfer of property to that same trust.

Still, our articles are our personal opinions and interpretations of the law. Tax practitioners may not rely on opinions of other tax practitioners to justify a planning or reporting position. None of our opinions, or the personal opinions of the other authors identified in this article (even those

[65] *See* Montgomery Purdue redacted IRS private letter ruling request (Oct. 23, 2023).

who are well-known), are "substantial authority for the tax treatment of an item"[66] that can be asserted as a defense to a possible preparer penalty, damages claim, or resulting bar association complaint.

Instead, practitioners have a nondelegable responsibility to read section 675 and the related regulations[67] on their own and, based on the plain meaning of those words and without selectively disregarding any of them[68] or inserting made-up words into them, reach their own conclusions about whether there is a reasonable basis for their planning and reporting positions. To prevent damage to clients from illusory inadvertent S terminations after the death of the first grantor, and possible lost tax savings for S corp owners and their estates, those practitioners who are not confident they can do that for themselves might want to consider referring the clients to others who can. ■

[66] Excluded from the reg. section 1.6662-4(d)(3)(ii) listing of "substantial authority for the tax treatment of an item" are opinions of other tax professionals: "Conclusions reached in treatises, legal periodicals, legal opinions, or opinions rendered by tax professionals are not authority. The authorities underlying such expressions of opinion where applicable to the facts of a particular case, however, may give rise to substantial authority for the tax treatment of an item."

[67] At the top of the reg. section 1.6662-4(d)(3)(iii) listing of "substantial authority for the tax treatment of an item" are "applicable provisions of the Internal Revenue Code and other statutory provisions; proposed, temporary and final regulations construing such statutes."

[68] Intentionally disregarding an unambiguous and directly on-point regulation risks incurring the accuracy-related penalty. Under reg. section 1.6662-3(c)(1), disclosure on the return may avoid the accuracy-related penalty if "in case of a position contrary to a regulation, the position represents a good faith challenge to the validity of the regulation. This disclosure exception does not apply, however, in the case of a position that does not have a reasonable basis."