



VIA ELECTRONIC SUBMISSION
November 2, 2016

John D. MacEachen
CC:PA:LPD:PR (REG-163113-02)
Internal Revenue Service, Room 5203
Ben Franklin Station, P.O. Box 7604
Washington, DC 20044

Re: Comments to Proposed Regulations on Estate, Gift, and Generation Skipping Transfer Taxes; Restrictions on Liquidation of an Interest (REG-163113-02)

Dear Mr. MacEachen:

Associated Builders and Contractors, Inc. (“ABC”) hereby submits the following comments to the Internal Revenue Service in response to the REG-163113-02, Estate, Gift, and Generation-Skipping Transfer Taxes; Restrictions on Liquidation of an Interest, 81 Fed. Reg. 51413 (proposed Aug. 4, 2016) (the “Proposed Regulations.”)

About Associated Builders and Contractors, Inc.

ABC is a national construction industry trade association representing nearly 21,000 members. ABC and its 70 chapters help members develop people, win work and deliver that work safely, ethically and profitably for the betterment of the communities in which they work. ABC's membership represents all specialties within the U.S. construction industry and is comprised primarily of firms that perform work in the industrial and commercial sectors. Moreover, the vast majority of our contractor members are classified as small businesses. Our diverse membership is bound by a shared commitment to the merit shop philosophy in the construction industry. The philosophy is based on the principles of nondiscrimination due to labor affiliation and the awarding of construction contracts through open, competitive bidding based on safety, quality and value.

Impact of Proposed Regulations on Contractors

The construction industry is overwhelmingly comprised of closely held businesses, many of them family-owned. With few comparable transactions and no ready market for liquidation, values must be estimated based on the hypothetical sale price between two willing and unrelated parties. While a variety of factors are considered, two key discounts often apply:

Discount for Lack of Control (DLOC): Minority shares are inherently less valuable in that the owner does not have control over key business decisions, from dividends and compensation to outright liquidation. That is, control carries with it a premium. If the interest being transferred does not represent a controlling stake, an appraiser will apply a discount to account for this disadvantage.

Discount for Lack of Marketability (DLOM): A minority stake in a closely held business can be difficult to sell. With no ready market and few willing buyers, an appraiser will apply a discount reflecting the difficulty and expense of liquidation. Such an asset is worth less than a similar interest in a readily marketable asset.

In aggregate, lack of control and marketability discounts are often valued at 30 percent or more, reflecting the underlying economic realities: minority interests and assets without a ready market are worth significantly less than controlling stakes and marketable ones.

As written, the proposed regulations would effectively wipe out these discounts for family-owned businesses. Not because these discounts are being curtailed, mind you, but because related owners are being treated differently under the proposed rule than non-related owners. This disparate treatment is illogical at best and discriminatory at worst. And either way it amounts to the owner of a family business paying a higher estate tax than that of an identically situated non-family business. Related shareholders are forced to use an inflated valuation merely by virtue of their lineage, without regard for fair market factors.

This was not what Congress had in mind when it empowered IRS via Treasury under Section 2704. We know this because they told us as much in the conference report. In defining the scope of “certain restrictions and lapsing rights” pondered under Section 2704, the report clearly states, “These rules do not affect minority discounts or other discounts available under present law.¹” Under the proposed regulations, IRS disregards this context and infers a dubious “lapsing right” based on family control.

But we know the world doesn’t work this way. Families don’t always agree. An aggregate majority stake in a business among related persons doesn’t imply or entail effective control. And for decades the US Tax Court has sided with taxpayers on this question, even as IRS has sought to argue for a sweeping approach to so-called Family Attribution. IRS itself conceded as much in 1993:

In determining the value of a gift of a minority block of stock in a closely-held corporation, the block should be valued for gift tax purposes without regard to the family relationship of the donee to other shareholders.²

¹ U.S. Congress. Conference Committee Report Concerning the Omnibus Budget Reconciliation Act of 1990. (H. Rept. 101-964)

² Revenue Ruling 93-12. Internal Revenue Service. 1993-1 C.B. 202

What the proposed regulations seek to do is re-assert the same Family Attribution standard that the court rejected more than twenty years ago. Treasury officials have disputed this characterization and profess that this was not their intention. But a plain reading of the proposed rule makes this the simplest interpretation, and at best exposes family businesses to adverse rulings down the road. If Treasury didn't mean to prevent family-owned businesses from employing discounts to reflect fair market value, that is reason enough to rescind the proposed language and try again to limit its scope with that intention made explicit. There is no room for ambiguity when it comes to protecting and preserving family businesses.

ABC requests that the proposed regulations be withdrawn immediately and in their entirety. Promulgation of these regulations as written would be highly detrimental to the many family-owned businesses in the construction industry.

Thank you for the opportunity to submit comments on this matter.

Respectfully submitted,

A handwritten signature in black ink that reads "Liam P. Donovan". The signature is written in a cursive, flowing style.

Liam Donovan
Director of Legislative and Political Affairs