

## Part III - Administrative, Procedural, and Miscellaneous

### Extension of Interim Guidance on Section 67 Limitations on Estates or Trusts

Notice 2008-116

#### PURPOSE

This notice extends to taxable years that begin before January 1, 2009, the interim guidance provided in Notice 2008-32, 2008-11 I.R.B. 593, on the treatment under § 67 of the Internal Revenue Code of investment advisory costs and other costs subject to the 2-percent floor under § 67(a) that are integrated as part of one commission or fee paid to the trustee or executor (“Bundled Fiduciary Fee”) and are incurred by a trust other than a grantor trust (nongrantor trust) or an estate. Notice 2008-32 is modified and superseded.

#### BACKGROUND

On January 16, 2008, the Supreme Court of the United States issued its decision in Michael J. Knight, Trustee of William L. Rudkin Testamentary Trust v. Commissioner, 552 U.S. \_\_\_\_, 128 S. Ct. 782 (2008), holding that costs paid to an investment advisor by a nongrantor trust or estate generally are subject to the 2-percent floor for

miscellaneous itemized deductions under § 67(a). The IRS and the Treasury Department expect to issue regulations under § 1.67-4 of the Income Tax Regulations consistent with the Supreme Court's holding in Knight. The regulations also will address the issue raised when a nongrantor trust or estate pays a Bundled Fiduciary Fee for costs incurred in-house by the fiduciary, some of which are subject to the 2-percent floor and some of which are fully deductible without regard to the 2-percent floor. The regulations, however, will not be issued in time to be applicable to the 2008 taxable year.

Notice 2008-32 provides interim guidance that specifically addresses the treatment of a Bundled Fiduciary Fee. In short, Notice 2008-32 provides that taxpayers will not be required to determine the portion of a Bundled Fiduciary Fee that is subject to the 2-percent floor under § 67 for any taxable year beginning before January 1, 2008.

#### EXTENSION OF INTERIM GUIDANCE

Taxpayers will not be required to determine the portion of a Bundled Fiduciary Fee that is subject to the 2-percent floor under § 67 for any taxable year beginning before January 1, 2009. Instead, for each such taxable year, taxpayers may deduct the full amount of the Bundled Fiduciary Fee without regard to the 2-percent floor.

Payments by the fiduciary to third parties for expenses subject to the 2-percent floor are readily identifiable and must be treated separately from the otherwise Bundled Fiduciary Fee.

#### EFFECT ON OTHER DOCUMENTS

Notice 2008-32 is modified and superseded.

## CONTACT INFORMATION

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