

# TWO THINGS CERTAIN®

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## IRC §645 Election – A Tale of Two Estates

*By Jeremy C. Johnson*

To understand the importance and utility of the IRC §645 election, first one must understand that there are fundamentally two different types of “estates” that must be present to allow for the option of this election. These are a probate estate and a trust estate. A probate estate occurs when there are assets in the sole name of a decedent that must be administered and distributed, through the supervision of the court, to the living beneficiaries/heirs; after all debts, expenses, taxes and claims/conflicts have been dealt with. The probate estate would have its own EIN (entity identification number) for tax purposes and would be required to file its own IRS Form 1041 Fiduciary Income Tax Return. Typically, a trust estate occurs when the decedent dies seized of a funded trust instrument; which governs the administration and distribution of the trust assets to beneficiaries outside of the probate process. Said trust estate would also have its own EIN (entity identification number) for tax purposes and would be required to file its own IRS Form 1041 Fiduciary Income Tax Return.

There are times when someone dies with a funded trust; however, for one reason or another they also had assets outside of the trust upon his/her death. In this scenario, the decedent would have both a probate estate and a trust estate. The Executor would be in control of the probate estate and would be required to interact with the IRS on its behalf; the Trustee would be in control of the trust estate and would be required to interact with the IRS on its behalf. In some circumstances, this may cause duplication of effort and create an overall inefficiency in the broader administration of the two “estates.” In order to avoid this problem, IRC §645 election allows the Trustee and the Executor to effectively combine trust estate return and the probate estate return into one unified tax return, filed as an estate. Also, in certain circumstances where there is no separate probate estate, this election can be used to file the trust estate return as though the trust were a probate estate.

This election is valid for only two years following the decedent’s date of death (the “Election Period”), so the Executor/Trustee should also consider the anticipated length of trust estate and/or probate estate administration before making the election. In making the election, certain tax planning advantages are gained by filing as an estate, rather than as a trust:

1. The material participation requirement for the passive loss rules is waived (i.e., participation is treated as active);
2. The charitable set-aside deduction under IRC §642(c) is allowed;
3. The estate may use a fiscal year end and possibly defer income to a future tax year; and
4. Use of the fiscal year end may allow enough time to file only one tax return and finalize matters efficiently.

The IRC §645 election is made by filing IRS Form 8855 within the Election Period. The trust must meet the definition as a Qualified Revocable Trust (“QRT”) meaning that on the day the decedent died, the trust was treated as owned by the decedent under IRS §676 by reason of a power to revoke said trust that was exercisable by the decedent (determined without regard to IRS §672(e)).

The process of actually initiating the IRC §645 election can be complicated, which is why it is so important you (the Executor and/or Trustee) sit down and talk to an estate and trust attorney and/or your tax preparation professional to figure out how you can take advantage of this important provision. The Attorneys of Johnson, Gasink & Baxter, LLP stand ready to assist clients with the difficult and often confusing options that may present themselves during the administration of a trust estate and/or probate estate. Do not hesitate to contact us if you need to engage our legal services.



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About the Author:

Jeremy Johnson is an experienced problem solver who helps individuals and businesses achieve and protect their goals of prosperity, stability and growth through appropriate planning. Jeremy takes great pride in making sure that his work for clients is always reliable, correct, and on time.

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