

b. Contributions to a self-settled special needs trust by the settlor, or someone on the settlor's behalf, may be a completed gift for gift tax purposes if distributions are in the discretion of an independent trustee and trust assets are not reachable by general creditors pursuant to the law of the state governing the trust (analogous to the domestic asset protection trust (or, "DAPT") analysis). See *Herzog v. Commissioner*, 116 F.2d 591 (2d Cir. 1941) and Revenue Rulings 76-103 and 77-378. Note: A completed gift for gift tax purposes may not be a completed gift for estate tax purposes (i.e., inclusion of the trust assets in the gross estate for estate tax purposes could still result). See PLR 9837007. See also Chief Counsel Memorandum ("CCM") 201208026.

c. There is an argument that a contribution by the settlor to the trustee of a self-settled special needs trust is not a gift (because the settlor receives valuable consideration in return). Please see *Sullivan v. Schultz (In re Schultz)*, 368 B.R. 832 (Bankr.D.Minn 2007).

C. Administration of Self-Settled Special Needs Trusts

1. Income Tax

a. Inter Vivos - Grantor trust rules apply during settlor's lifetime. See IRC §§ 671 - 679.

(i) Settlor – The settlor must report all of the trust's income, losses, deductions and credits on settlor's individual income tax return. See IRC §§ 673 and 677. It may also be advisable to include a IRC § 675(4)(C) power to substitute assets of equivalent value to insure grantor trust status and to provide flexibility to the settlor (or the settlor's legal representative) for future estate planning.

(ii) Trustee – The trustee should comply with Treas. Reg. § 1.671-4(b), which sets forth three alternatives for reporting grantor trust income tax information to the IRS.

b. Post-Mortem – Traditional fiduciary income taxation rules regarding trusts apply (simple versus complex trusts, distributable net income, etc.). Generally, see IRC §§ 641 – 668. The trustee will need to prepare and file fiduciary income tax returns (IRS Form 1041 along with supporting forms and schedules and, if applicable, state forms and schedules).

2. Gift and Estate Tax – Gift and estate taxes should not be applicable to the administration of self-settled special needs trusts since trust distributions should be to the settlor or on the settlor's behalf.