IRS ISSUES PROPOSED SAFE HARBOR PRESCRIBING "AGE 100 METHODOLOGIES"

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When a resident of the United Kingdom turns 100 years of age, he or she receives a letter bearing congratulations and best wishes from the Queen. In the United States, the new centenarian receives a similar letter from the President, but under a recent proposal from the Internal Revenue Service (IRS) that might just be accompanied by a Form 1099-R reporting all the gain on policies insuring the centenarian's life.

From the inception of the federal tax definition of "life insurance contract" in section 7702,[1] enacted as part of the Deficit Reduction Act of 1984,[2] insureds have occasionally had the audacity (or hope) to live past age 100, even though the computational rules of section 7702 require that the deemed maturity date for a contract not be beyond the insured's age 100.[3] This dichotomy between tax rules and physical reality has helped engender speculation regarding whether any tax consequence might be associated with an insured reaching this milestone. In Notice 2009-47,[4] the IRS addresses this question by proposing a safe harbor, and requesting comments, on the circumstances where continued tax deferral and life insurance tax treatment after an insured's age 100 should apply.

BACKGROUND

While the question of how to treat life insurance contracts after an insured has reached age 100 has existed since the enactment of section 7702, some related questions, such as the interaction between the tax law's constructive receipt doctrine and section 72, predated that enactment. Attention especially focused on the post-100 treatment of contracts after the adoption, in 2004, of a new mortality table by the National Association of Insurance Commissioners (NAIC)—*i.e.*, the 2001 Commissioners' Standard Ordinary Mortality Tables (2001 CSO Tables), which extended to the insured's age 121, whereas the prior 1980 Commissioners' Standard Ordinary Mortality Tables (1980 CSO Tables) had terminated at the insured's age 100. Early in 2005, for example, the American Council of Life Insurers (ACLI) asked the IRS to issue guidance on the subject.[5] Also, the Taxation Section of the Society of Actuaries established the 2001 CSO Maturity Age Task Force (SOA Task Force) to study the interaction of the new mortality tables and the tax law, including the application of section 7702's requirement of a deemed maturity date between the insured's age 95 and 100 to a contract that may provide coverage through the end of the 2001 CSO Tables at the insured's age 121. In the May 2006 issue of *TAXING TIMES*, the SOA Task Force published an article entitled "2001 CSO Implementation Under IRC Sections 7702 and 7702A," which set forth a recommended methodology for applying sections 7702 and 7702A that would be "actuarially acceptable" in the case of life insurance contracts that do not provide for an actual maturity date before the insured attains age 100.

PROPOSED SAFE HARBOR— AGE 100 TESTING METHODOLOGIES

On May 22, 2009, the IRS issued Notice 2009-47 proposing a safe harbor with respect to calculations under sections 7702 and 7702A for contracts that satisfy the requirements of those provisions using *all* of the "Age 100 Testing Methodologies" described in the Notice. This proposed safe harbor generally follows the recommendations of the SOA Task Force, with some exceptions (one of which is very material) as discussed below. The Notice actually cites to the publication of those recommendations in the May 2006 issue of *TAXING TIMES*—the first time that the Taxation Section newsletter has been cited in a government document.

In describing the background for issuance of the proposed safe harbor, Notice 2009-47 raises the following three categories of tax questions in connection with insureds living (or the possibility of their living) past the deemed maturity date prescribed by section 7702:

1) How are calculations under sections 7702 and 7702A affected by the possibility of an insured living past the deemed maturity date prescribed by section 7702?

2) How, if at all, is the application of case law requiring risk shifting and risk distribution for insurance contracts,

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such as *Helvering v. Le Gierse*,[6] affected by the fact that there may be little or no net amount at risk (NAR) under contracts after the deemed maturity date prescribed by section 7702?

3) In what circumstances, if any, does the constructive receipt doctrine, as described in Treas. Reg. section 1.451-2, apply if there is little or no NAR under contracts after the deemed maturity date prescribed by section 7702?

The proposed safe harbor, which is set forth in section 3.01 of Notice 2009-47, states that "… the Service would not challenge the qualification of a contract as a life insurance contract under § 7702, or assert that a contract is a MEC under § 7702A, provided the contract satisfies the requirements of those provisions using all of the Age 100 Testing Methodologies of section 3.02 of this notice." On its face, the proposed safe harbor clearly addresses the first of the above three categories of tax questions, *i.e.*, calculations under sections 7702 and 7702A, and it can be inferred that the proposed safe harbor was intended to address the other two categories of questions as well. In addition, the Notice does not place any scope limitations on the availability of the proposed safe harbor, other than the statement in section 1 of the Notice that its purpose is to address the application of sections 7702 and 7702A "to life insurance contracts that mature after the insured individual … attains age 100." Thus, for example, it seems possible that the proposed safe harbor could apply to contracts based on the 1980 CSO Tables as well as to contracts based on the 2001 CSO Tables. Of course, the scope of the proposed safe harbor is implicitly limited to the extent contracts do not meet one or more of the Age 100 Testing Methodologies. Section 3.02 of Notice 2009-47 sets forth the Age 100 Testing Methodologies, which consist of the following nine requirements:

Section 3.02(a) – All determinations under sections 7702 and 7702A (other than the cash value corridor of section 7702(d)) would assume that the contract will mature by the date the insured attains age 100, notwithstanding a later contractual maturity date (such as by reason of using the 2001 CSO Tables).

Section 3.02(b) – The net single premium determined for purposes of the cash value accumulation test under section 7702(b) (CVAT), and the necessary premiums determined for purposes of section 7702A(c)(3)(B)(i), would assume an endowment on the date the insured attains age 100.

Section 3.02(c) – The guideline level premium determined under section 7702(c)(4) would assume premium payments through the date the insured attains age 99.

Section 3.02(d) – Under section 7702(c)(2)(B), the sum of the guideline level premiums would increase through a date no earlier than the date the insured attains age 95 and no later than the date the insured attains age 99. Thereafter, premium payments would be allowed and would be tested against this limit, but the sum of the guideline level premiums would not change.

Section 3.02(e) – In the case of a contract issued or materially changed within fewer than seven years of the insured's attaining age 100, the net level premium under section 7702A(b) would be computed assuming level annual premium payments over the number of years between the date the contract is issued or materially changed and the date the insured attains age 100.

Section 3.02(f) – If the net level premium under section 7702A(b) is computed over a period of less than seven years by reason of an issuance or material change within fewer than seven years of the insured's attaining age 100, the sum of the net level premiums would increase through attained age 100. Thereafter, the sum of the net level premiums would not increase, but premium payments would be allowed and would be tested against this limit for the remainder of the seven-year period.

Section 3.02(g) – The rules of section 7702A(c)(2) and (6) concerning reductions in benefits within the first seven contract years would apply whether or not a contract is issued or materially changed fewer than seven years before the date the insured attains age 100.

Section 3.02(h) – A change in benefits under (or in other terms of) a life insurance contract that occurs on or after the date the insured attains age 100 would not be treated as a material change for purposes of section 7702A(c)(3) or as an adjustment event for purposes of section 7702(f)(7).

Section 3.02(i) – Notwithstanding the above described methodologies, a contract that remains in force would additionally be required to provide at all times a death benefit equal to or greater than 105 percent of the cash value.

The proposed safe harbor would be effective as of the date of publication in the Internal Revenue Bulletin. (The recommendations of the SOA Task Force are reprinted in the sidebar on page 21.)

2001 CSO Maturity Age Task Force Recommendations

The Taxation Section established the 2001 CSO Maturity Age Task Force to propose methodologies that would be actuarially acceptable under sections 7702 and 7702A of the Code for calculations under contracts that do not provide for actual maturity before age 100. The task force recommendations are as follows:

- Calculations will assume that all contracts will pay out in some form by age 100, as presently required by the Code, rather than by age 121 as would occur "naturally" under the 2001 CSO.
- The net single premium used in the cash value accumulation test corridor factors, of section 7702(b) of the Code, and the necessary premium calculations, of section 7702A(c)(3)(B)(i) of the Code, will be for an endowment at age 100.
- The guideline level premium present value of future premium calculations, of section 7702(c)(4) of the Code, will assume premium payments through attained age 99.
- The sum of guideline level premiums, of section 7702(c)(2)(B) of the Code, will continue to increase through attained age 99. Thereafter, premium payments will be allowed and will be tested against this limit, but the sum of guideline level premiums will not increase. If the guideline level premium is negative, the sum of guideline level premiums will also not decrease after age 99.
- In the case of contracts issued or materially changed near to the insured's age 100, the MEC present value of future premium calculations will assume premium payments for the lesser of seven years or through age 99. This is the case because the computational rules of section 7702A(c)(1) provide: "Except as provided in this subsection, the determination under subsection (b) of the 7 level annual premiums shall be made … by applying the rules … of section 7702(e)", suggesting a need for a new seven pay premium. However, since section 7702(e)(1)(B) requires a maturity date of no later than the insured's attained age 100, it arguably overrides the computational rules of section 7702A(c)(1) and thus the calculations would end at age 100. Given the lack of guidance, reasonable alternative interpretations may also be available on this point.
- If the MEC present value of future premium calculations assumes premium payments through age 99 because this is less than seven years, the sum of the MEC premiums will continue to increase through attained age 99. Thereafter, premium payments will be allowed and will be tested against this limit for the remainder of the seven-year period, but the sum of MEC premiums will not increase after age 99.
- In the case of contracts issued or materially changed near to the insured's age 100, followed by a reduction in benefits, the MEC reduction rule, of section 7702A(c)(2), will apply for seven years from the date of issue or the date of the material change for a single life contract. For contracts insuring more than one life, the MEC reduction rule, of section 7702A(c)(6), will apply until the youngest insured attains age 121.
- Adjustments that occur on or after attained age 100 will not necessitate a material change for MEC testing purposes or an adjustment event for guideline premium purposes.
- Necessary premium/deemed cash value testing, of section 7702A(c)(3)(B)(i) of the Code, will cease at attained age 100.
- Policies can remain in force after age 100 with a death benefit greater than or equal to the cash value.

Excerpt from the May 2006 issue of *TAXING TIMES*.

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USE OF A SINGLE SAFE HARBOR TO ADDRESS DIFFERENT TAX QUESTIONS

As noted above, an impetus for the insurance industry's request for guidance under sections 7702 and 7702A was the extension of mortality rates in the 2001 CSO Tables to age 121 and how this technically should be accounted for in calculating guideline premiums, net single premiums, and 7-pay premiums under sections 7702 and 7702A, each of which must use a deemed maturity date pursuant to section 7702(e)(1)(B) that is no earlier than the insured's age 95 and no later than the insured's age 100. These technical questions under sections 7702 and 7702A could be very material to compliance with those Code provisions as well. For example, if a contract designed to comply with the CVAT employed a methodology for reflecting a post-age 100 maturity that differed from what the IRS thought appropriate, it might be that the "terms of the contract" would not comply with the requirements of the CVAT and the contract would fail to comply with section 7702 from its date of issuance—*i.e.*, long before there was even an inkling of a question that might be raised under *Le Gierse* or the constructive receipt doctrine.

This highlights one of the fundamental concerns with respect the proposed safe harbor – that it has created a single, unified safe harbor to address all three categories of tax questions described above rather than creating an independent safe harbor for methodologies under sections 7702 and 7702A and then, separately, addressing concerns under *Le Gierse* and the constructive receipt doctrine. Even if the safe harbor were confined to the permissible methodology (or methodologies) in order to calculate the quantitative limitations under sections 7702 and 7702A properly, there still may be issues worthy of debate. The 105 percent corridor requirement of section 3.02(i) of the Age 100 Testing Methodologies, however, has no relevance whatever to the requirements of sections 7702 and 7702A. It does not relate to whether a contract is life insurance under applicable law, nor does it follow in any manner any of the quantitative requirements of the section 7702 and 7702A tests. Rather, the focus of the 105 percent corridor requirement appears to pertain exclusively to questions under *Le Gierse* and/or the constructive receipt doctrine.

It is questionable whether safe harbor relief is needed under either *Le Gierse* or the constructive receipt doctrines, and if needed, whether a 105 percent corridor requirement properly addresses the issues raised by these doctrines. More fundamentally, however, tying the 105 percent corridor requirement to the safe harbor needed for calculations under sections 7702 and 7702A is both unnecessary and counterproductive. To illustrate this point, if an insurer intended to issue thousands of contracts using a contract form designed to comply with the CVAT, as noted above it would be critical that the terms of that contract form ensure that the appropriate relationship between the net single premium and the cash value is maintained "at any time" (meaning at all times) during the life of the contract. Thus, failure to account properly for post-age 100 circumstances could cause every one of those thousands of contracts to fail to comply with the CVAT. In contrast, the issues under *Le Gierse* and the constructive receipt doctrine apply, if at all, *only* once the NAR of a contract becomes very small or zero.

Very few of the thousands of insureds under the contracts in this example will survive to the deemed maturity date of section 7702, and thus any pertinent issues under *Le Gierse* and the constructive receipt doctrine are confined to a relatively small number of contracts. This is not to say that it is unimportant whether or how these authorities apply to contracts after the deemed maturity date. It is worthwhile that comments were requested on these subjects. However, safe harbor relief under sections 7702 and 7702A seemingly should not be tied to any independent questions arising in connection with these subjects.

COMMENTARY OF THE AGE 100 TESTING METHODOLOGIES PERTAINING TO CALCULATIONS UNDER SECTIONS 7702 AND 7702A

A hallmark of the Age 100 Testing Methodologies is that they confirm that the computational rule of section 7702(e)(1)(B), requiring use of a deemed maturity date no later than the insured's age 100, *must* be used in calculating guideline premiums, net single premiums, 7-pay premiums, and necessary premiums under sections 7702 and 7702A, even though a contract actually may mature at a later date. Section 3.02(a) of the Notice generally imposes this requirement, in stating that all determinations under sections 7702 and 7702A (other than the cash value corridor) must assume that the contract will mature by the date the insured attains age 100, notwithstanding a later contractual maturity date. This starting point for the proposed safe harbor is entirely appropriate, in that the statute clearly imposes this requirement. And indeed, the remaining requirements of the Age 100 Testing Methodologies generally reflect the controlling nature of the section 7702(e)(1)(B) computation rule. There are, however, a number of questions and comments that might be raised with respect to the specifics of some of these Methodologies, including the following:

- *Scope of proposed safe harbor.* One question regards the intended scope of the proposed safe harbor. In light of the 105 percent corridor requirement of section 3.02(i) of the Notice, we suspect that the proposed safe harbor would apply to very few, if any, life insurance contracts currently in force (unless they were amended). Also, while the Notice on its face is not limited to contracts with mortality guarantees based on the 2001 CSO Tables, it is somewhat unclear whether the Notice was intended to make safe harbor relief available for contracts based on predecessor tables.

- *Deemed maturity dates other than age 100.* As noted above, section 7702(e)(1)(B) permits use of a deemed maturity date on any date on or after the insured's age 95, but earlier than on or before the insured's age 100. However, a number of the Age 100 Testing Methodologies appear to preclude application of the proposed safe harbor where calculations have been performed using a deemed maturity date earlier than the insured's age 100, such as the insured's age 95. For example, section 3.02(b) of the Notice provides that net single premiums and necessary premiums must assume an endowment on the date the insured attains age 100. Similarly, section 3.02(c) of the Notice requires that guideline level premiums be determined assuming premium payments through the date the insured attains age 99. In contrast, section 3.02(a) of the Notice requires the assumption of a maturity date "by the date" the insured attains age 100 (seemingly meaning that an earlier date could be used, as long as it is consistent with section 7702(e)(1)(B)), and section 3.02(d) of the Notice requires that the sum of guideline level premiums increase through a date no earlier than the date the insured attains age 95 and no later than the date the insured attains age 99.[7]

- *Calculation of 7-pay premiums within seven years prior to age 100.* Section 3.02(e) of the Notice provides that, in the case of a contract issued or materially changed within fewer than seven years of the insured's attaining age 100, the net level premium under section 7702A(b) would be computed assuming level annual premium payments over the number of years between the date the contract is issued or materially changed and the date the insured attains age 100.[8] Thus, for example, if there were a material change to a contract at the insured's age 94, a 6-pay premium would be calculated (using age 100 as the deemed maturity date) rather than a 7-pay premium under this requirement of the Age 100 Testing Methodologies. At first glance, one might question the appropriateness of this result, since sections 7702A(b) and (c)(1) call for the calculation of "7 level annual premiums." A conundrum, however, exists due to the requirement of section 7702A(c)(1)(B) that the computational rules of section 7702(e), including the requirement of a deemed maturity date no later than the insured's age 100, be used in calculating the "7-pay" premium. Of necessity, one of the statutory provisions must take precedence, and for purposes of a safe harbor it is reasonable that the IRS viewed the computational rule as controlling, since as a general matter the computational rules operate to constrain how calculations under sections 7702 and 7702A are performed.[9]

- *Period of testing.* Section 3.02(d) of the Notice provides that testing under the guideline premium limitation would continue after an insured's age 100, even though the sum of guideline level premiums would have ceased accruing at the insured's age 100. Further, section 3.02(f) contemplates that, in the case of a "7-pay" premium calculated for a period of less than seven years (as just described), testing under the 7-pay test would continue for the entire 7-pay period, even though the sum of net level premiums under this test would have ceased accruing at the insured's age 100. This methodology mirrors the recommendations of the SOA Task Force. It appears to be based upon the notion that,

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while the computational rules may affect the calculation of a guideline premium, net single premium, or 7-pay premium, they should not be extended to limit the period during which testing is applied.[10]

- *Reduction in benefits rule of section 7702A(c)(2)*. Similarly to the period of testing just described, section 3.02(g) of the Notice requires application of the reduction in benefits rule of section 7702A(c)(2) for the same period of time that generally would apply, even if that period extends beyond the insured's age 100. Thus, in the case of a contract covering a single life, if there were a material change on the date the insured attained age 94, the "7-pay" premium would be a 6-pay premium with the last net level premium accruing on the date the insured attains age 99; however, the reduction in benefits rule would apply for seven years from the date of that material change, *i.e.*, until the insured attains age 101. Likewise, in the case of a joint and survivor life insurance contract, the reduction in benefits rule would apply to reductions occurring at any time, including after one or both of the insureds attains age 100.[11]

- *No adjustments or material changes after age 100.* Section 3.02(h) of the Notice provides that a change in benefits under (or in other terms of) a life insurance contract that occurs on or after the date the insured attains age 100 would not be treated as a material change for purposes of section 7702A(c)(3) or as an adjustment event for purposes of section 7702(f)(7). This provision reflects the recommendation made by the SOA Task Force and is intended to eliminate any problems with calculations of guideline premiums, net single premiums, and 7-pay premiums that otherwise might arise from the fact that section 7702(e)(1)(B) requires use of a deemed maturity date no later than the insured's age 100 which, after that date, would of course be in the past. Thus, for example, the guideline premium limitation would continue to apply for the life of the contract, based on the limitation that exists as of the date the insured attains age 100. And under the CVAT, the Notice's treatment reflects a view that the net single premium for a $1 of death benefit equals $1 on and after the insured's age 100.[12]

CONSTRUCTIVE RECEIPT AND *LE GIERSE* CONSIDERATIONS

All but one of the Age 100 Testing Methodologies address the manner in which calculations under sections 7702 and 7702A should be performed, with particular focus on the effect of the computational rule of section 7702(e)(1)(B) that requires calculations to assume a maturity date no later than the insured's age 100. As previously noted, the final Age 100 Testing Methodology set forth in section 3.02(i) of the Notice, however, pertains to tax considerations that are independent of sections 7702 and 7702A. In particular, this provision states that "… a contract that remains in force would additionally be required to provide at all times a death benefit equal to or greater than 105 percent of the cash value."[13] Based on the nature of this requirement and the IRS's prior discussion in the Notice, it appears that this 105 percent corridor requirement is being established in order to address concerns which might otherwise exist under the constructive receipt doctrine or *Le Gierse* and related authorities. Thus, it seems that the IRS has concern that, for example, if a contract had no NAR after the insured's age 100, a contract owner might be taxable on gain in the contract pursuant to one or both of these lines of authority.

There are a number of authorities and considerations that have a bearing on this question. Treas. Reg. section 1.451-2(a) sets forth the general rule for constructive receipt, stating that:

> Income although not actually reduced to a taxpayer's possession is constructively received by him in the taxable year during which it is credited to his account, set apart for him, or otherwise made available so that he could have drawn upon it at any time…. However, income is not constructively received if the taxpayer's control of its receipt is subject to substantial limitations or restrictions.

Two key questions are 1) whether the constructive receipt doctrine has any application to a life insurance contract prior to its actual maturity or surrender in light of the rules of section 7702, comprehensively defining the term "life insurance contract" for tax purposes, and section 72, which governs the tax treatment of amounts received from a life insurance contract, and 2) if the constructive receipt doctrine has some application, what NAR and other factors might operate as "substantial limitations or restrictions" to preclude constructive receipt.

With respect to the applicability of the constructive receipt doctrine at all, Congress, in its enactment of section 7702, arguably has already decided how much NAR is required for a contract in order for it to be treated as life insurance for tax purposes. It seems relevant, for example, that in prescribing the cash value corridor requirement of section 7702(d) for contracts subject to the guideline premium limitation, Congress thought it acceptable for a declining NAR to apply to a contract that would reduce to 1 percent of the cash value beginning with the insured's attained age 94 and then reduce to 0 percent of the cash value beginning with the insured's attained age 95. (In contrast, the similar applicable percentage requirement of section 101(f)(1)(A)(ii) and (3)(C), a precursor to the cash value corridor, required an NAR equal to 5 percent of cash value beginning with the insured's age 75, and this corridor requirement continued indefinitely thereafter.) The CVAT implicitly requires a minimum NAR as well, which reduces to 0 percent of cash value by the insured's age 100. If Congress already has considered the question of permissible NARs in order to be treated as life insurance, should this targeted decision be bypassed through assertion of the applicability of more general tax law principles?[14]

With respect to whether the constructive receipt doctrine would apply by its own terms (if it were concluded to be applicable), it is important to remember that the application of the doctrine in any case depends on all the facts and circumstances. Thus, the NAR under a contract would be just one consideration, albeit an important one. It also would be important to examine other valuable rights that a contract owner would need to give up in order to receive a contract's cash value, *e.g.*, the ability to apply monies towards a settlement option in the life insurance contract based on annuity purchase rate guarantees under the contract.[15]

In addition, some of the authorities that would be relevant to the constructive receipt question include *Cohen v. Comm'r.*,[16] which held that a requirement to surrender a life insurance contract to realize income constituted a "substantial restriction," rendering the constructive receipt doctrine inapplicable, and *Nesbitt v. Comm'r.*,[17] concluding that the constructive receipt doctrine was inapplicable where the taxpayer would have had to surrender dividend additions, *i.e.*, paid-up life insurance, of $24,898 to receive a cash payment of $24,508.

Finally, and practically, we observe that section 101(g) provides that amounts received under a life insurance contract covering an individual who is terminally ill are treated as having been received by reason of the death of the insured, so that the exclusion from income under section 101(a) generally would apply. For this purpose, an individual will be considered terminally ill if he or she is certified by a physician as having an illness or physical condition that can reasonably be expected to result in death in 24 months or less. We suspect that a substantial percentage of insureds at age 100 would be able to be certified as terminally ill under this standard.[18] For those insureds with an "illness or physical condition" that allows for such certification, questions which might be raised under *Le Gierse* or the constructive receipt doctrine would seem to be moot. Of course, a day may come when mortality greatly improves and section 101(g) would have less relevance. But that day has not yet arrived, at least based on the currently prevailing mortality table.

Thus, the NAR under a contract would be just one consideration, albeit an important one.

REQUEST FOR COMMENTS

In section 4 of Notice 2009-47, the IRS requests comments on the proposed safe harbor. The IRS also requests comments on other questions that can arise where a life insurance contract matures after the insured's age 100. For example, the IRS asks about the treatment of a contract that is initially purchased after the insured's age 100. The IRS also asks about the application of the constructive receipt doctrine where NAR is zero at age 100, and regarding the application of the section 101(a)(1) exclusion from income in such circumstances. The comments are requested to be filed with the IRS by Oct.13, 2009.

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CONCLUSION

As the number of centenarians increases,[19] the tax rules applicable to life insurance after an insured's age 100 correspondingly will become more important as well. It certainly would be troubling to have to explain to insureds or their beneficiaries that an excludable death benefit would have been provided if death had occurred, say, at age 99, but that a substantial tax burden applies instead because the insured had the good fortune of living a little longer. The IRS is to be commended for the steps taken in Notice 2009-47 towards resolving open questions, including its request for comments on the tax questions arising in these circumstances.

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END NOTES

1 Except as otherwise indicated, references to "section" are to sections of the Internal Revenue Code of 1986, as amended (the "Code").

2 Pub. L. No. 98-369 (1984).

3 Specifically, the computational rule in section 7702(e)(1)(B) provides that for purposes of calculations under section 7702 "the maturity date [of a contract] … shall be deemed to be no earlier than the day on which the insured attains age 95, and no later than the day on which the insured attains age 100." This computational rule also applies for purposes of calculating 7-pay premiums under section 7702A. *See* section 7702A(c)(1)(B). Prior to the issuance of Notice 2009-47, there has been little guidance on the application of this computational rule. *See* Treas. Reg. § 1.7702-2 (providing guidance on determining an insured's attained age); PLR 200910001 (September 8, 2008) (holding that the section 7702(e)(1)(B) computational rule must be used even if there is an expectation that a contract will not continue to the insured's age 95).

4 2009-24 I.R.B. 1083.

5 *See* Letter from Laurie Lewis, Senior Vice President, Taxes & Ret. Sec., ACLI, to the IRS (Jan. 10, 2005) (submitting comments on Notice 2004-61, 2004-2 C.B. 96 and requesting guidance on the application of section 7702(e)(1)(B)).

6 312 U.S. 531 (1941). The Notice also cites *Evans v. Comm'r.*, 56 T.C. 1142 (1971) (where the court characterized a contract as consisting of an annuity element and a life insurance element and concluded that, once the cash value exceeded the face amount of death benefit, the life insurance element had ceased and only the annuity remained). *Cf.* Rev. Rul. 66-322, 1966-2 C.B. 123 (regarding certain contracts purchased by an employer's qualified pension plan trust and stating that: "The contracts in question provided insurance protection and contained an element of risk for many years [and thus] were insurance contracts within the meaning of the *Le Gierse* holding at the time they were executed. The mere elimination of that risk when the reserve exceeded the face amount of the contract is not considered to be a conversion of the contract of insurance into an annuity contract for purposes of section 1.402(a)-1(a)(2) of the regulations"). The IRS has considered whether Rev. Rul. 66-322 should be revoked in light of *Evans*, but has not done so. *See, e.g.*, GCM 38934 (July 9, 1982).

7 Consistency often is a necessary consideration in calculations under sections 7702 and 7702A. For example, if guideline level premiums were calculated assuming a deemed maturity date on the date the insured attains age 95, the sum of guideline level premiums only would accrue through the date that the insured attains age 94.

8 The statement in section 3.02(e) of the Notice that "the sum of the net level premiums would increase through attained age 100" appears to contemplate a deemed maturity date at attained age 100, with the last "7-pay" premium being paid on the date the insured attains age 99. (The SOA Task Force recommended an assumption of premium payments through the insured's attained age 99 in this instance.)

9 The SOA Task Force stated in its recommendations that "the computational rules of section 7702A(c)(1) provide that '[e]xcept as provided in this subsection, the determination under section (b) of the 7 level annual premiums shall be made…by applying the rules… of section 7702(e),' suggesting the need for a new seven pay premium. However, since section 7702(e)(1)(B) requires a maturity date of no later than the insured's attained age 100, it arguably overrides the computational rules of section 7702A(c)(1), and thus the calculations would end at age 100."

10 It is arguable, of course, that due to the deemed maturity date prescribed by sections 7702 and 7702A, Congress contemplated no testing of contracts after the deemed maturity date.

11 Of course, under Treas. Reg. section 1.7702-2(c), the younger insured's life would be relevant for purposes of applying the computational rules under section 7702(e). (The language of section 3.02(g) of Notice 2009-47 may need a slight revision since in its current form it could be read as indicating that section 7702A(c)(6) concerns reductions in benefits during a 7-pay period rather than during the entire life of a contract.)

12 While section 3.02(h) of the Notice on its face applies to changes in benefits or terms of a contract, it is also possible that receipt of a premium that exceeds the necessary premium limitation under section 7702A(c)(3)(B) may result in a material change. Presumably, it was intended that material changes for this reason also could not occur after the insured's age 100, since the deemed maturity date would precede the date on which the unnecessary premium is received.

13 The SOA Task Force's recommendations did not include any requirement similar to this 105 percent corridor. Rather, it stated that "Policies can remain in force after age 100 with a death benefit greater than or equal to the cash value."

14 We also note that, in GCM 38934 (1982), in considering the tax treatment of universal life insurance prior to the enactment of section 101(f), the IRS observed that, if the savings element of the contract were characterized as a deferred annuity, the "comprehensive rules of section 72 preclude the application of the doctrine of constructive receipt to amounts credited to the cash value of a deferred annuity." *See also* PLR 200742010 (July 19, 2007), PLR 200313016 (Dec. 20, 2002), and PLR 200151038 (Sept. 25, 2001), each noting that section 72 provides a comprehensive scheme for the taxation of life insurance. The regime established by sections 72 and 7702 also seems to address any concerns under *Le Gierse* and similar authorities in circumstances where other factors are not present (such as facts similar to those in *Le Gierse*, involving an integrated transaction that entailed the purchase of a non-refund life annuity together with a life insurance contract).

15 The Annuity 2000 Basic Table extends to an insured's age 115.

16 39 T.C. 1055 (1963).

17 43 T.C. 629 (1965).

18 It appears that, based on the 2001 CSO Tables, the average insured would have a life expectancy at age 100 of less than 3 years.

19 It is estimated that there were approximately 96,548 centenarians living in the U.S. as of November 1, 2008. *See http://www.census.gov/popest/national/asrh/2007-nat-res.html.*