



# INCOMPLETE NON-GRANTOR TRUSTS: AN EFFECTIVE TAX PLANNING STRATEGY

AUGUST 2020

The incomplete non-grantor (ING) trust is a self-settled, asset protection trust that provides income tax benefits to grantors residing in states with high state income tax rates or states that do not recognize the federal grantor trust rules. An ING trust allows a grantor to fund the trust without incurring gift tax while also achieving non-grantor status for income tax purposes.

## STRATEGY

There are several steps to properly structure an ING trust.

### Step 1: State Selection

The first step is to determine which state the trust will be established in. For the ING trust to be effective, the grantor will want to pick a state that has **no or very low income tax** and permits the creation of self-settled asset protection trusts under its laws. Delaware and Nevada are commonly selected for these reasons.



### Step 2: Limited Power of Appointment

When creating an ING trust, it is essential to retain a limited power of appointment over the trust assets. The limited power of appointment renders the gift incomplete for transfer tax purposes, and the client is not subject to gift tax upon funding of the trust.



### Step 3: Trust Distributions to Client

For the grantor to retain the ability to receive distributions, while not triggering grantor trust status, the trust instrument should include language establishing a distribution committee. The distribution committee is typically comprised of trust beneficiaries other than the client. By setting it up in this manner, the committee is considered an adverse party, allowing the trust to maintain non-grantor status.



### Step 4: Funding the Trust

In most cases, the grantor should fund the trust with appreciating assets that have a low basis.



## BENEFITS

The ING trust has several tax benefits. The most notable is the state income tax savings for grantors living in high-income tax states. The grantor ideally transfers appreciated assets with a low basis into the trust. Because the ING trust is established in a low- or no-income-tax state, the eventual sale of these assets is subject to minimal, if any, state income tax.

The ING trust is also beneficial for grantors living in a state that does not recognize the federal grantor trust rules, such as Pennsylvania. The ING trust allows the undistributed income and gains to remain untaxed by the resident state of the trust.

The grantor has the ability to transfer assets into a trust, retain access to the cash-flow, and avoid making a completed gift for federal gift tax consequences. This is especially appealing to clients that have already fully utilized their lifetime gift tax exemption. The trust assets are, however, included in the grantor's gross estate upon death and are eligible for a step-up in basis at that time.

## POTENTIAL ROADBLOCKS

The IRS has approved this structure through multiple private letter rulings but has not issued any formal guidance specifically addressing this type of trust structure that can be relied on by all taxpayers. As a result, grantors may wish to seek their own private letter ruling before implementing this strategy.

Higher income tax states have started to push back on the ING trust structure. In 2014, New York enacted a law that arguably made the trust structure ineffective for its residents. Though unsuccessful, California attempted to put an end to the trust structure.

## CONCLUSION

The ING trust is an incomplete gift for gift tax purposes and a non-grantor trust for income tax purposes. It is a useful planning tool for high-net-worth individuals who live in either a high-income-tax state or a state that does not conform to the federal grantor trust rules.

## CONTACT

### JOHN NUCKOLLS

Tax Managing Director  
415-490-3393 / [jnuckolls@bdo.com](mailto:jnuckolls@bdo.com)

### TRACI KRATISH PUMO

Tax Partner  
561-207-3239 / [tpumo@bdo.com](mailto:tpumo@bdo.com)

### CRAIG WITCHER

National Managing Director  
616-389-8679 / [cwitcher@bdo.com](mailto:cwitcher@bdo.com)

### AMY E. PIENTA

Managing Director  
312-730-1414 / [apienta@bdo.com](mailto:apienta@bdo.com)

BDO is the brand name for BDO USA, LLP, a U.S. professional services firm providing assurance, tax, and advisory services to a wide range of publicly traded and privately held companies. For more than 100 years, BDO has provided quality service through the active involvement of experienced and committed professionals. The firm serves clients through more than 65 offices and over 700 independent alliance firm locations nationwide. As an independent Member Firm of BDO International Limited, BDO serves multi-national clients through a global network of more than 88,000 people working out of more than 1,600 offices across 167 countries and territories.

BDO USA, LLP, a Delaware limited liability partnership, is the U.S. member of BDO International Limited, a UK company limited by guarantee, and forms part of the international BDO network of independent member firms. BDO is the brand name for the BDO network and for each of the BDO Member Firms. For more information please visit: [www.bdo.com](http://www.bdo.com).

Material discussed is meant to provide general information and should not be acted on without professional advice tailored to your needs.

© 2020 BDO USA, LLP. All rights reserved.