INTERNAL REVENUE SERVICE
NATIONAL OFFICE TECHNICAL ADVICE MEMORANDUM

199917066

JAN 19 1999

Index (UIL) No.: 7520.02-00
2013.05-00
CASE MIS No.: TAM-119314-98

Taxpayer's Name:
Taxpayer's Address:

Taxpayer's Identification No:
Years Involved:
Date of Conference:

LEGEND:

Decedent -
Spouse -
Trust -
$x -

ISSUE:

For purposes of determining whether the actuarial tables are used in valuing the Decedent's income interests for purposes of the tax on prior transfers credit under § 2013, is the applicable standard for departing from the tables the test set forth in § 20.7520-3(b)(3)(i) of the Estate Tax Regulations, or the test under Rev. Rul. 80-80, 1980-1 C.B. 194, if the Spouse/transferor died before the effective date of § 20.7520-3(b) and the Decedent/transferee died after that date?

CONCLUSION:

In determining whether the actuarial tables are to be used in valuing Decedent's income interests, the standard for departing from the tables contained in Rev. Rul. 80-80 is used.

373

FACTS:

Spouse died testate in November 1995 survived by the Decedent, who subsequently died in February 1996. Under Article VI of Spouse's will, the residue of Spouse's probate estate passed to Trust, a revocable trust, established by Spouse in 1994.

Article II(B)(1) of Trust provided for creation of a "GST-exempt Marital Trust." Under the terms of the trust, the trustee is directed to pay the net income of the trust to Decedent for Decedent's life. Decedent had a testamentary limited power to appoint the trust corpus to any descendant of Spouse. Any interest not so appointed would pass in trust for the benefit of Spouse's then living descendants, per stirpes.

Article II(B)(2) provided for the creation of another marital trust ("Marital Trust"). Under the terms of the Marital Trust, the net income is to be paid to Decedent for life. The Decedent had a testamentary general power to appoint trust principal to anyone, including Decedent's estate. Any unappointed principal would pass in trust for the benefit of Spouse's then living descendants, per stirpes.

Decedent died in February 1996, three months after Spouse. In August 1996, the executors of Decedent's estate filed a disclaimer with the appropriate local court, disclaiming the power of appointment granted to Decedent pursuant to Article II(B)(2) of the Trust.

On the Federal estate tax return filed for the Spouse's estate, the executor elected under § 2056(b)(7) to treat a fraction of the GST-exempt Marital Trust and the Marital Trust as qualified terminable interest property (QTIP) for purposes of the marital deduction.

In computing the estate tax liability, the Decedent's estate claimed a credit under § 2013 in the amount of $x, with respect to the income interests in the portions of the GST-exempt Marital Trust and the Marital Trust, that were not subject to the QTIP election. Rev. Rul. 59-9, 1959-1 C.B. 232. The amount of this credit was determined based on the value of the income interests on the date of the Spouse's death, computed using the actuarial tables contained in § 20.2031-7(d)(6) and the applicable § 7520 interest rate for the date of Spouse's death.

The facts presented indicate that, at the time of Spouse's death, Decedent was suffering from a terminal illness.

LAW AND ANALYSIS:

Section 2001(a) of the Internal Revenue Code imposes a tax on the transfer of the taxable estate of every decedent who is a citizen of the United States.

Section 2013(a) allows a credit against the estate tax imposed under § 2001(a) for all or part of the amount of Federal estate taxes paid with respect to the transfer of property to the decedent (the transferee) by or from a person (the transferor) who died within 10 years before, or within 2 years after, the decedent's death.

Section 2013(b) provides that, subject to the limitation in § 2013(c), the credit shall be the amount which bears the same ratio to the estate tax paid with respect to the estate of the transferor as the value of the property transferred bears to the taxable estate of the transferor decreased by any death taxes paid with respect to the transferor's estate.

Section 2013(c)(1) provides that the credit shall not exceed the amount by which the estate tax imposed by § 2001 (after deducting the credits provided for in §§ 2010, 2011, 2012, and 2014) computed without regard to § 2013, exceeds the tax computed by excluding from the decedent's gross estate the value of the property transferred (taking into account any applicable adjustments).

Section 2013(d)(3) provides generally that, for purposes of § 2013, the value of property transferred to the decedent will be the value used for the purpose of determining the federal estate tax liability of the estate of the transferor.

Section 20.2013-4(a) of the Estate Tax Regulations states that, for purposes of the § 2013 credit, the value of the property transferred to the decedent is the value at which the property was included in the transferor's gross estate, subject to certain specified reductions. The section further provides:

> If the decedent received a life estate or a remainder or other limited interest in property that was included in a transferor decedent's gross estate, the value of the interest is determined as of the date of the transferor's death on the basis of recognized valuation principles (see §§ 20.2031-7 (or, for certain prior periods, § 20.2031-7A) and 20.7520-1 through 20.7520-4).

375

Section 20.7520-3(b) was published on December 13, 1995, and is effective with respect to estates of decedents dying after December 13, 1995. Section 20.7520-3(b)(3)(i) provides:

> Except as provided in paragraph (b)(3)(ii) of this section, the mortality component prescribed under section 7520 may not be used to determine the present value of an annuity, income interest, remainder interest, or reversionary interest if an individual who is a measuring life is terminally ill at the time of the decedent's death. For purposes of this paragraph (b)(3), an individual who is known to have an incurable illness or other deteriorating physical condition is considered terminally ill if there is at least a 50 percent probability that the individual will die within 1 year. However, if the individual survives for eighteen months or longer after the date of the decedent's death, that individual shall be presumed to have not been terminally ill at the date of death unless the contrary is established by clear and convincing evidence.

Section 20.7520-3(b)(3)(ii) provides an exception to the terminal illness rule set forth in § 20.7520-3(b)(3)(i), above. The section provides that, in the case of the allowance of the credit for tax on a prior transfer under section 2013, if a final determination of the federal estate tax liability of the transferor's estate has been made under circumstances that required valuation of the life interest received by the transferee, the value of the property transferred, for purposes of the credit allowable to the transferee's estate, shall be the value determined previously in the transferor's estate. Otherwise, for purposes of section 2013, the provisions of § 20.7520-3(b)(3)(i) govern in valuing the property transferred.

Prior to the promulgation of § 20.7520-3(b), the test for determining whether an individual was terminally ill, such that the actuarial tables would not be used in valuing an interest based on that individual's life expectancy, was set forth in Rev. Rul. 80-80, 1980-1 C.B. 194.[1] Under Rev. Rul. 80-80, if the valuation of an individual's life interest is required for federal estate or gift tax purposes, the actuarial tables in the regulations are to be applied:

> [U]nless the individual is known to have been afflicted, at the time of the transfer, with an incurable physical condition that is in such an advanced stage that death is clearly imminent. Death is not clearly imminent if there is a reasonable possibility of survival for more than a very brief period.

---

[1] Rev. Rul. 80-80 was declared obsolete effective December 14, 1995. See Rev. Rul. 96-3, 1996-1 C.B. 348.

> For example, death is not clearly imminent if the individual may survive for a year or more and if such a possibility is not so remote as to be negligible.

Thus, under Rev. Rul. 80-80, if the possibility that the measuring life would survive for more than one year was "so remote as to be negligible," the measuring life was deemed to be terminally ill and the actuarial tables could not be used to value an interest based on the measuring life.

Rev. Rul. 80-80 further provided that the above principle will govern cases involving the application of § 2013, unless a final determination of the federal tax liability of the transferor's estate has been made under circumstances that required valuation, by whatever method, of the life interest received by the transferee. If such a valuation was required, then the value of the property transferred, for the purposes of the credit allowable to the transferee's estate, was to be the value determined previously for the transferor's estate.

In this case, the estate of the Spouse (the transferor) elected to treat a fraction of the value of the GST-exempt Marital Trust and the Marital Trust as QTIP for purposes of the marital deduction. Accordingly, the Spouse's taxable estate included the portion of both marital trusts that were not subject to the QTIP election. None of the interests received by Decedent in these trusts specifically required valuation in order to determine the federal estate tax liability of the Spouse's (transferor's) estate.

As discussed above, under § 20.2013-4(a), where the decedent/transferee received a life estate or other limited interests in property, then for purposes of determining the § 2013 credit, the value of the interest received is determined <u>as of the date of the transferor's death</u>, on the basis of recognized valuation principles. Thus, under the regulation, although the Decedent died after the effective date of § 20.7520-3(b)(3)(i), the date of death of Spouse is the determinative date under § 2013 for valuing the interest that passed to the transferee from the transferor. The valuation methodology in effect on the date of death of Spouse (the transferor) is the methodology used in valuing Decedent's interests that passed from the Spouse. Accordingly, the terminal illness test under Rev. Rul. 80-80 is used in determining whether Spouse's interests are to be valued under the actuarial tables. See, Rev. Rul. 75-293, 1975-2 C.B. 357, involving a situation where the transferor died in 1970 and bequeathed a remainder interest in property to the transferee who died in 1974. The ruling concludes that, for purposes of determining the actuarial value of the remainder interest for § 2013 purposes, the actuarial tables in effect on the transferor's date of death are used, and not the tables in effect on the transferee's date of death.

37

The purpose of § 20.7520-3(b)(3)(ii), which provides that the terminal illness test set forth in § 20.7520-3(b)(3)(i) will govern for purposes of the § 2013 credit if the final determination of the federal estate tax liability of the transferor's estate did not require valuation of the life interest received by the transferee, is to require that the transferee's actual medical condition at the time of the transfer (the transferor's date of death) be taken into consideration in determining the value of the life interest in all situations other than those in which the value was previously determined. This provision is not a transitional rule that mandates the use of the § 20.7520-3(b)(3)(i) terminal illness test regardless of the date of the transferor's death. See, Preamble to T.D. 8630, 1996-1 C.B. 339, 340. Accordingly, the valuation methodology in effect at the date of the transfer is the methodology used in arriving at the applicable value.

A copy of this technical advice memorandum is to be given to the taxpayer(s). Section 6110(j)(3) of the Code provides that it may not be used or cited as precedent.

- End -