Bulletin No. 1996–7
February 12, 1996

HIGHLIGHTS OF THIS ISSUE

These synopses are intended only as aids to the reader in identifying the subject matter covered. They may not be relied upon as authoritative interpretations.

INCOME TAX

PS–2–95, page 50.
Proposed regulations under section 731 relating to the treatment of a distribution of marketable securities by a partnership. A public hearing will be held on April 3, 1996.

T.D. 8642, page 4.
Final regulations under sections 704 and 737 of the Code relating to the recognition of gain or loss by contributing partner on distribution of contributed property or other property.

ESTATE TAX

T.D. 8644, page 16.
Final regulations relating to generation-skipping transfer tax.

ADMINISTRATIVE

Del. Order 232 (Rev. 2), page 49.
The authority to modify or rescind a Taxpayer Assistance Order (TAO) is limited only to the Commissioner, Deputy Commissioner, or Taxpayer Ombudsman. Del. Order 232 (Rev. 1) superseded.

Del. Order 239 (Rev. 1), page 49.
The Taxpayer Ombudsman is delegated the authority to issue Taxpayer Assistance Orders (TAO) to intervene on behalf of taxpayers that make a positive action with respect to taxpayer cases; to prepare an annual report of the most significant problems taxpayers face when conducting business with IRS and suggest solutions where applicable; and to establish a system to track the Service's response to changes suggested in the annual report. Del. Order 239 amended.

Notice 96–10, page 47.
Books and records; imaging systems. This notice provides a proposed revenue procedure regarding the use by taxpayers of an imaging system to satisfy the requirement of section 6001 of the Code to maintain books and records.

Announcement 96–8, page 56.
Publication 595, Tax Guide for Commercial Fishermen, is corrected.

Finding Lists begin on page 60.
Announcement of Disbarments and Suspensions begins on page 57.

Mission of the Service

The purpose of the Internal Revenue Service is to collect the proper amount of tax revenue at the least cost; serve the public by continually improving the quality of our products and services; and perform in a manner warranting the highest degree of public confidence in our integrity, efficiency and fairness.

Statement of Principles of Internal Revenue Tax Administration

The function of the Internal Revenue Service is to administer the Internal Revenue Code. Tax policy for raising revenue is determined by Congress.

With this in mind, it is the duty of the Service to carry out that policy by correctly applying the laws enacted by Congress; to determine the reasonable meaning of various Code provisions in light of the Congressional purpose in enacting them; and to perform this work in a fair and impartial manner, with neither a government nor a taxpayer point of view.

At the heart of administration is interpretation of the Code. It is the responsibility of each person in the Service, charged with the duty of interpreting the law, to try to find the true meaning of the statutory provision and not to adopt a strained construction in the belief that he or she is ‘‘protecting the revenue.’’ The revenue is properly protected only when we ascertain and apply the true meaning of the statute.

The Service also has the responsibility of applying and administering the law in a reasonable, practical manner. Issues should only be raised by examining officers when they have merit, never arbitrarily or for trading purposes. At the same time, the examining officer should never hesitate to raise a meritorious issue. It is also important that care be exercised not to raise an issue or to ask a court to adopt a position inconsistent with an established Service position.

Administration should be both reasonable and vigorous. It should be conducted with as little delay as possible and with great courtesy and considerateness. It should never try to overreach, and should be reasonable within the bounds of law and sound administration. It should, however, be vigorous in requiring compliance with law and it should be relentless in its attack on unreal tax devices and fraud.

Introduction

The Internal Revenue Bulletin is the authoritative instrument of the Commissioner of Internal Revenue for announcing official rulings and procedures of the Internal Revenue Service and for publishing Treasury Decisions, Executive Orders, Tax Conventions, legislation, court decisions, and other items of general interest. It is published weekly and may be obtained from the Superintendent of Documents on a subscription basis. Bulletin contents of a permanent nature are consolidated semiannually into Cumulative Bulletins, which are sold on a single-copy basis.

It is the policy of the Service to publish in the Bulletin all substantive rulings necessary to promote a uniform application of the tax laws, including all rulings that supersede, revoke, modify, or amend any of those previously published in the Bulletin. All published rulings apply retroactively unless otherwise indicated. Procedures relating solely to matters of internal management are not published; however, statements of internal practices and procedures that affect the rights and duties of taxpayers are published.

Revenue rulings represent the conclusions of the Service on the application of the law to the pivotal facts stated in the revenue ruling. In those based on positions taken in rulings to taxpayers or technical advice to Service field offices, identifying details and information of a confidential nature are deleted to prevent unwarranted invasions of privacy and to comply with statutory requirements.

Rulings and procedures reported in the Bulletin do not have the force and effect of Treasury Department Regulations, but they may be used as precedents. Unpublished rulings will not be relied on, used, or cited as precedents by Service personnel in the disposition of other cases. In applying published rulings and procedures, the effect of subsequent legislation, regulations, court decisions, rulings, and procedures must be considered, and Service personnel and others concerned are cautioned against reaching the same conclusions in other cases unless the facts and circumstances are substantially the same.

The Bulletin is divided into four parts as follows:

Part I.—1986 Code.
This part includes rulings and decisions based on provisions of the Internal Revenue Code of 1986.

Part II.—Treaties and Tax Legislation.
This part is divided into two subparts as follows: Subpart A, Tax Conventions, and Subpart B, Legislation and Related Committee Reports.

Part III.—Administrative, Procedural, and Miscellanous.
To the extent practicable, pertinent cross references to these subjects are contained in the other Parts and Subparts. Also included in this part are Bank Secrecy Act Administrative Rulings. Bank Secrecy Act Administrative Rulings are issued by the Department of the Treasury's Office of the Assistant Secretary (Enforcement).

Part IV.—Items of General Interest.
With the exception of the Notice of Proposed Rulemaking and the disbarment and suspension list included in this part, none of these announcements are consolidated in the Cumulative Bulletins.

The first Bulletin for each month includes an index for the matters published during the preceding month. These monthly indexes are cumulated on a quarterly and semiannual basis, and are published in the first Bulletin of the succeeding quarterly and semi-annual period, respectively.

The Bulletin Index-Digest System, a research and reference service supplementing the Bulletin, may be obtained from the Superintendent of Documents on a subscription basis. It consists of four Services: Service No. 1, Income Tax; Service No. 2, Estate and Gift Taxes; Service No. 3, Employment Taxes; Service No. 4, Excise Taxes. Each Service consists of a basic volume and a cumulative supplement that provides (1) finding lists of items published in the Bulletin, (2) digests of revenue rulings, revenue procedures, and other published items, and (3) indexes of Public Laws, Treasury Decisions, and Tax Conventions.

For sale by the Superintendent of Documents U.S. Government Printing Office, Washington, D.C. 20402.

Section 704.—Partner's Distributive Share

26 CFR 1.704–4: Distribution on contributed property.

T.D. 8642

DEPARTMENT OF THE TREASURY
Internal Revenue Service
26 CFR Part 1

Recognition of Gain or Loss by Contributing Partner on Distribution of Contributed Property or Other Property

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations relating to the recognition of gain or loss on certain distributions of contributed property by a partnership under section 704(c)(1)(B) of the Internal Revenue Code of 1986 (Code). This document also contains final regulations relating to the recognition of gain on certain distributions to a contributing partner under section 737. The final regulations affect partnerships and their partners and are necessary to provide guidance for complying with the applicable tax law.

EFFECTIVE DATE: January 9, 1995.

FOR FURTHER INFORMATION CONTACT: Stephen J. Coleman, (202) 622-3060 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

The Revenue Reconciliation Act of 1989 added section 704(c)(1)(B) and section 704(c)(2) to the Internal Revenue Code. Section 704(c)(1)(B) provides that, in the case of a distribution of contributed property to another partner within five years of its contribution, the contributing partner must recognize gain or loss in an amount equal to the gain or loss the partner would have been allocated under section 704(c)(1)(A) on a sale of the property by the partnership at its fair market value at the time of the distribution. Section 704(c)(2) provides an exception for distributions of certain like-kind property.

The Energy Policy Act of 1992 added section 737 to the Code. Section 737 requires a partner who contributes appreciated property to recognize gain on a subsequent distribution of other property to the contributing partner to the extent of the lesser of (i) the net precontribution gain on property contributed by the partner, or (ii) the excess of the value of the distributed property over the adjusted basis of the partner's interest in the partnership.

On January 9, 1995, a notice of proposed rulemaking (PS–76–92; PS–51–93 [1995–1 C.B. 1001]) under section 704(c)(1)(B) and section 737 was published in the Federal Register (60 FR 2352). Written comments responding to this notice were received. No public hearing was held because no hearing was requested. After consideration of all comments received, the proposed regulations under section 704(c)(1)(B) and section 737 are adopted as revised by this Treasury decision.

Summary of Significant Comments and Revisions

The significant comments on the proposed regulations and the revisions made in the final regulations are discussed below.

A. *Section 704(c)(1)(B)*

Determination of Gain and Loss

The proposed regulations provide that section 704(c)(1)(B) applies only to a distribution that is properly characterized as a distribution to a partner acting in the capacity of a partner within the meaning of section 731 and section 737, and not to a transaction or distribution that is subject to provisions other than section 731(a) or section 737. Comments requested that the provision be clarified. The final regulations clarify that section 704(c)(1)(B) applies only to the extent that a transaction is a distribution under section 731. References to transactions and distributions not subject to section 704(c)(1)(B) have been deleted.

One commentator suggested certain clarifying revisions to the proposed regulations' definition of fair market value. The definition in the proposed regulations, however, is identical to the definition of fair market value in the 704(b) regulations, and distributed property should have the same fair market value for purposes of determining gain and loss under section 704(c)(1)(B) and determining capital account adjustments under section 704(b). The final regulations therefore adopt the definition in the proposed regulations without change.

The proposed regulations provide that the amount of gain or loss resulting from a distribution of partnership property is determined as if the distributed property had been sold by the partnership to the distributee partner. As a result, if built-in loss property is distributed to a partner that holds more than a 50 percent interest in partnership capital or profits, the built-in loss that otherwise would be recognized is disallowed under section 707(b)(1)(A). One commentator suggested that section 704(c)(1)(B) was intended to address disguised sales between partners and that, therefore, a loss should be disallowed on a distribution only if it would be disallowed on a direct sale between the partners. Section 704(c)(1)(B), however, respects the form of the transaction as between the partnership and a partner and does not recast the transaction as a disguised sale. See H.R. Rep. No. 247, 101st Cong., 1st Sess. 406 (1989). The final regulations therefore adopt the proposed regulations without change.

Several of the provisions in the proposed regulations refer to distributions that are part of ''the same plan or arrangement.'' Commentators requested clarification of this term. The reference to distributions that are part of the same plan or arrangement was intended to reflect the fact that distributions of multiple properties to one partner or distributions of different properties to more than one partner over a period of time may be treated as part of the same distribution under general principles of taxation, such as the step transaction doctrine. The final regulations remove the reference to ''same plan or arrangement'' and refers to distributions that are part of the same distribution. This change is made for simplification only and is not intended as a substantive change to the scope of a distribution for tax purposes. As under current law, distributions do not need to be contemporaneous to be part of the same distribution.

Several comments were received regarding the effect of a partnership termination under section 708(b)(1)(B). One comment suggested that it was not clear whether property that had previously been contributed to the partnership (and was therefore already subject to a five-year period) was subject to a new five-year period after the termination. The final regulations clarify that a new five-year period does not begin to the extent of any pre-termination gain or loss that would have been allocated to a contributing partner under section 704(c)(1)(A) on a sale of contributed property immediately before the termination.

The legislative history of section 704(c)(1)(B) indicates that a constructive termination does not change the application of section 704(c) to pre-contribution gain or loss on property contributed to the partnership before termination. One comment read this legislative history as possibly suggesting that a pro rata distribution is deemed to occur under section 708(b)(1)(B) for section 704(c)(1)(A) purposes, but a different distribution is deemed to occur for section 704(c)(1)(B) purposes. The comment expressed concern about the complexity of such a system. Section 704(c)(1)(B), however, does not require or impose such a ''hybrid system.'' The amount of gain or loss under section 704(c)(1)(B) is determined by reference to the amount of gain or loss that would have been allocated to the partner under section 704(c)(1)(A) if the property had been sold. Thus, property of a partnership that terminates under section 708(b)(1)(B) is deemed to be distributed to the partners in the same manner for both sections.

Another comment suggested it was unclear whether section 704(c)(1)(B) could apply to property that had not been contributed by a partner to the partnership prior to the termination. The final regulations confirm that a new five-year period begins for all property that is deemed contributed to the new partnership after the termination (which would include property not actually contributed to the partnership), except to the extent that such built-in gain or loss would have been allocated to the contributing partner under section 704(c)(1)(A) on a sale of the contributed property immediately before the termination.

Commentators also requested guidance on the interaction of section 708(b)(1)(B) and section 704(c) in general. The IRS and Treasury recognize the need for additional guidance on this issue, but such guidance is beyond the scope of these regulations. The IRS and Treasury are considering a separate project involving the interaction of section 704(c) and section 708(b)(1)(B) and invite additional comments and suggestions regarding the project.

Exceptions

The proposed regulations provide that section 704(c)(1)(B) does not apply to property contributed to the partnership on or before October 3, 1989. One commentator requested an exception for property required to be contributed under a binding contract entered into on or before October 3, 1989. The statutory effective date provisions, however, do not contain a binding contract exception. Accordingly, the final regulations adopt the proposed regulations without change.

One commentator suggested an additional exception for distributions of an undivided interest in property. The final regulations provide that section 704(c)(1)(B) does not apply to such a distribution to the extent that the distributed interest does not exceed the undivided interest contributed by the distributee partner.

One commentator also requested an additional exception for distributions of fungible property because the partners may not be able to track the specific contributed property. The final regulations do not provide such an exception. Contributed property may be fungible from an economic perspective, but such property is generally not fungible for tax purposes because each contributed property will have its own individual tax basis.

The proposed regulations provide an exception for distributions of section 704(c) property to a noncontributing partner in liquidation of the partnership if the contributing partner receives an interest in the contributed property and the built-in gain or loss in that property is equal to or greater than the built-in gain or loss that would have otherwise been allocated to the contributing partner. One commentator suggested that the exception more clearly indicate the amount of built-in gain or loss that must be reflected in the property distributed to the contributing partner. The final regulations clarify that the amount of the built-in gain or loss must be equal to the gain or loss that would have been allocated to the contributing partner under section 704(c)(1)(A) if the contributed property had been sold immediately before the distribution.

One commentator also suggested expanding this exception to apply to the extent of the built-in gain or loss in the property distributed to the contributing partner. This comment is not adopted in the final regulations. The exception was intended to apply only in the limited situation in which a partnership liquidates and the value of the contributed property exceeds the contributing partner's capital account. In that situation, the portion of the contributed property in excess of the contributing partner's capital account would have to be distributed to another partner, thereby triggering section 704(c)(1)(B). The exception allows a partner to avoid section 704(c)(1)(B) in this situation, so long as the built-in gain or loss in the property distributed to the contributing partner is at least equal to the gain or loss that would have been allocated to the contributing partner under section 704(c)(1)(A) if the contributed property had been sold immediately before the distribution.

Special Rules

The proposed regulations provide a special rule under section 704(c)(2) for situations in which the partnership distributes like-kind property to a contributing partner within a specified period of the distribution of the property contributed by that partner. Under this rule, the gain or loss that otherwise would have been recognized on the distribution of the contributed property is reduced by the amount of the contributing partner's built-in gain or loss in the distributed like-kind property. One commentator criticized this rule as inconsistent with the statutory provision.

Section 704(c)(2) provides that ''[u]nder regulations prescribed by the Secretary, ... to the extent of the value of the [like-kind property distributed to the contributing partner, the calculation of the contributing partner's gain or loss attributable to the distribution of the contributed property] shall be [determined] as if the contributing partner had contributed to the partnership the [like-kind] property.'' This provision is generally intended to treat the contributing partner as if the partner had exchanged the contributed property for like-kind property in a nontaxable exchange outside of the partnership. This allows the contributing partner to avoid recognition of gain or loss under section 704(c)(1)(B) on the distribution of the contributed property to another partner because the contributing partner is treated as having contributed the like-kind property, not the property that is actually distributed to the other partner.

If the contributing partner, however, had engaged in a like-kind exchange outside of the partnership, the partner's built-in gain or loss in the like-kind property received would have been the same as the property that was surrendered. The rule in the proposed regulations reflects this result by limiting the application of section 704(c)(2) to the extent that the built-in gain or loss in the contributed property is not preserved in the like-kind property distributed to the contributing partner. The IRS and Treasury continue to believe that the regulations properly implement Congress' objective with respect to this provision. Therefore, the regulations are finalized without change.

One commentator also suggested a clarification of the interaction of the like-kind exception and the disguised sale rules of 707(a)(2)(B). The proposed regulations provide that the like-kind exception reduces any gain that would have otherwise been recognized under section 704(c)(1)(B). The proposed regulations also provide that section 704(c)(1)(B) applies only to a distribution to a partner within the meaning of section 731. There is no suggestion in section 704(c)(2) or the proposed regulations that the like-kind exception was intended as an exception to the disguised sale provisions. The final regulations confirm that the disguised sale provisions can apply to a distribution, even if the distribution would otherwise have qualified for the section 704(c)(2) like-kind exception.

Anti-Abuse Rule

Commentators made several suggestions for clarifying or modifying the anti-abuse rule in the proposed regulations. In particular, these commentators requested clarification of the relationship between this rule and the general partnership anti-abuse rule in Treas. Reg. section 1.701–2. The general anti-abuse regulation is a rule of general applicability that provides general principles to be applied in interpreting and applying all of the provisions of subchapter K. In certain situations, however, more specific anti-abuse rules are needed to carry out the purpose of a particular provision. The final regulations therefore adopt the rule in the proposed regulations without modification.

B. *Section 737*

Determination of Gain

The final regulations are clarified to provide that section 737 applies only to the extent that a transaction is a distribution under section 731. In accordance with section 737(d)(2), the final regulations also provide that section 737 does not apply to the extent that section 751(b) applies to the distribution.

Net Precontribution Gain

The proposed regulations provide that a distributee partner's net precontribution gain is determined without regard to the like-kind exception of section 704(c)(2) in situations in which the contributed property is not actually distributed to another partner. One commentator suggested deleting this provision as superfluous. The final regulations adopt the proposed regulations without change. This provision clarifies that section 737 does not contain a like-kind exception similar to the exception in section 704(c)(2). Section 737 applies even if the property received by the partner is of a like-kind with the contributed property.

Character of Gain

One commentator suggested that the proposed regulations fail to clarify whether there are two groups (ordinary and capital) for purposes of determining the character of a partner's net precontribution gain or whether there may be an additional section 1231 group or section 1245 and section 1250 groups. The final regulations adopt the proposed regulations without change.

The proposed regulations provide that character for purposes of a partner's net precontribution gain is determined as if the contributed property were sold to an unrelated third party. As a result, all of the provisions that are relevant in determining the character of gain or loss on a sale are relevant in determining the character of the net precontribution gain. For example, if the sale of property would have resulted in part capital gain and part ordinary income, the character of the net precontribution gain for that property is part ordinary and part capital. The same approach applies in determining the allocation of any adjustment to the partnership's basis in partnership property as a result of gain recognized by the distributee partner. A basis adjustment attributable to gain treated as capital gain under section 1231 would be allocated to the property that entered into the calculation of the amount of section 1231 gain.

One commentator also suggested that the proposed regulations do not clarify whether character is determined at the partnership or the partner level. This determination may be important in situations such as section 1231 where the character of the gain or loss may depend on the partner's particular tax circumstances. The final regulations clarify that the character of the gain or loss is determined at the partnership level for this purpose.

Exceptions

One commentator suggested adding an exception for certain divisive transactions in which the contributing partner continued to own an indirect interest in the contributed property. The final regulations add a new exception under which section 737 does not apply to a transfer of contributed property by a transferor partnership to a transferee partnership, followed by a distribution of an interest in the transferee partnership (and no other property) to the contributing partner in complete liquidation of the partner's interest.

This exception is added because the distributee partner has simply converted an interest in the transferor partnership into an interest in a transferee partnership that holds the same contributed section 704(c) property. The limitations on this exception ensure that the partner's basis in the transferee partnership attributable to the contributed property is the same as the partner's basis in the transferor partnership attributable to that property. This allows a partnership to engage in a divisive split-up transaction, while preventing any avoidance of section 737 that might occur as a result of the basis allocation rules for non-liquidating distributions.

The proposed regulations provide that section 737 does not apply to an incorporation of a partnership other than an incorporation involving an actual distribution of partnership property to the partners. One commentator suggested that this distinction between methods of incorporation creates an unnecessary trap for the unwary and may have a chilling effect on the conversion of partnerships into S corporations. The final regulations adopt the proposed regulations without change. The form of incorporation chosen by the partners is respected for Federal tax purposes and, as a result, the distribution of property in connection with the incorporation is treated as a distribution for purposes of section 737.

One commentator suggested an additional exception for distributions of an undivided interest in property similar to that described with respect to the regulations under section 704(c)(1)(B). The final regulations provide a comparable rule under section 737.

Anti-Abuse Rule

Commentators made several suggestions regarding the anti-abuse rule in the proposed regulations. These suggestions are essentially the same as the comments regarding the anti-abuse rule in the section 704(c)(1)(B) regulations, and thus the comments are discussed above.

Effective Date

These regulations are effective for distributions by a partnership to a partner on or after January 9, 1995.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in EO 12866. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) and the Regulatory Flexibility Act (5 U.S.C. chapter 6) do not apply to these regulations and, therefore, a Regulatory Flexibility Analysis is not required. Pursuant to section 7805(f) of the Internal Revenue Code, the notice of proposed rulemaking preceding these regulations was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Drafting Information

Several persons from the Office of Chief Counsel and the Treasury Department participated in the development of these regulations.

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Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAXES

Paragraph 1. The authority citation for part 1 is amended by adding the following citation:

Authority: 26 U.S.C. 7805 * * *

Section 1.704–4 also issued under 26 U.S.C. 704(c) * * *

Par. 2. Section 1.704–4 is added to read as follows:

§1.704–4 Distribution of contributed property.

(a) *Determination of gain and loss*—(1) *In general*. A partner that contributes section 704(c) property to a partnership must recognize gain or loss under section 704(c)(1)(B) and this section on the distribution of such property to another partner within five years of its contribution to the partnership in an amount equal to the gain or loss that would have been allocated to such partner under section 704(c)(1)(A) and §1.704–3 if the distributed property had been sold by the partnership to the distributee partner for its fair market value at the time of the distribution. See §1.704–3(a)(3)(i) for a definition of section 704(c) property.

(2) *Transactions to which section 704(c)(1)(B) applies*. Section 704(c)(1)(B) and this section apply only to the extent that a distribution by a partnership is a distribution to a partner acting in the capacity of a partner within the meaning of section 731.

(3) *Fair market value of property*. The fair market value of the distributed section 704(c) property is the price at which the property would change hands between a willing buyer and a willing seller at the time of the distribution, neither being under any compulsion to buy or sell and both having reasonable knowledge of the relevant facts. The fair market value that a partnership assigns to distributed section 704(c) property will be regarded as correct, provided that the value is reasonably agreed to among the partners in an arm's-length negotiation and the partners have sufficiently adverse interests.

(4) *Determination of five-year period*—(i) *General rule*. The five-year period specified in paragraph (a)(1) of this section begins on and includes the date of contribution.

(ii) *Section 708(b)(1)(B) terminations*. A termination of the partnership under section 708(b)(1)(B) begins a new five-year period for each partner with respect to the built-in gain and built-in loss property that the partner is deemed to recontribute to a new partnership following the termination, but only to the extent that the pre-termination built-in gain or loss, if any, on such property would not have been allocated to the contributing partner under section 704(c)(1)(A) and §1.704–3 on a sale of the contributed property to an unrelated party immediately before the termination. See §1.704–3(a)(3)(ii) for the definitions of built-in gain and built-in loss on section 704(c) property.

(5) *Examples*. The following examples illustrate the rules of this paragraph (a). Unless otherwise specified, partnership income equals partnership expenses (other than depreciation deductions for contributed property) for each year of the partnership, the fair market value of partnership property does not change, all distributions by the partnership are subject to section 704(c)(1)(B), and all partners are unrelated.

Example 1. Recognition of gain. (i) On January 1, 1995, A, B, and C form partnership ABC as equal partners. A contributes $10,000 cash and Property A, nondepreciable real property with a fair market value of $10,000 and an adjusted tax basis of $4,000. Thus, there is a built-in gain of $6,000 on Property A at the time of contribution. B contributes $10,000 cash and Property B, nondepreciable real property with a fair market value and adjusted tax basis of $10,000. C contributes $20,000 cash.

(ii) On December 31, 1998, Property A and Property B are distributed to C in complete liquidation of C's interest in the partnership.

(iii) A would have recognized $6,000 of gain under section 704(c)(1)(A) and §1.704–3 on the sale of Property A at the time of the distribution ($10,000 fair market value less $4,000 adjusted tax basis). As a result, A must recognize $6,000 of gain on the distribution of Property A to C. B would not have recognized any gain or loss under section 704(c)(1)(A) and §1.704–3 on the sale of Property B at the time of distribution because Property B was not section 704(c) property. As a result, B does not recognize any gain or loss on the distribution of Property B.

Example 2. Effect of post-contribution depreciation deductions. (i) On January 1, 1995, A, B, and C form partnership ABC as equal partners. A contributes Property A, depreciable property with a fair market value of $30,000 and an adjusted tax basis of $20,000. Therefore, there is a built-in gain of $10,000 on Property A. B and C each contribute $30,000 cash. ABC uses the traditional method of making section 704(c) allocations described in §1.704–3(b) with respect to Property A.

(ii) Property A is depreciated using the straight-line method over its remaining 10-year recovery period. The partnership has book depreciation of $3,000 per year (10 percent of the $30,000 book basis), and each partner is allocated $1,000 of book depreciation per year (one-third of the total annual book depreciation of $3,000). The partnership has a tax depreciation deduction of $2,000 per year (10 percent of the $20,000 tax basis in Property A). This $2,000 tax depreciation deduction is allocated equally between B and C, the noncontributing partners with respect to Property A.

(iii) At the end of the third year, the book value of Property A is $21,000 ($30,000 initial book value less $9,000 aggregate book depreciation) and the adjusted tax basis is $14,000 ($20,000 initial tax basis less $6,000 aggregate tax depreciation). A's remaining section 704(c)(1)(A) built-in gain with respect to Property A is $7,000 ($21,000 book value less $14,000 adjusted tax basis).

(iv) On December 31, 1997, Property A is distributed to B in complete liquidation of B's interest in the partnership. If Property A had been sold for its fair market value at the time of the distribution, A would have recognized $7,000 of gain under section 704(c)(1)(A) and §1.704–3(b). Therefore, A recognizes $7,000 of gain on the distribution of Property A to B.

Example 3. Effect of remedial method. (i) On January 1, 1995, A, B, and C form partnership ABC as equal partners. A contributes Property A1, nondepreciable real property with a fair market value of $10,000 and an adjusted tax basis of $5,000, and Property A2, nondepreciable real property with a fair market value and adjusted tax basis of $10,000. B and C each contribute $20,000 cash. ABC uses the remedial method of making section 704(c) allocations described in §1.704–3(d) with respect to Property A1.

(ii) On December 31, 1998, when the fair market value of Property A1 has decreased to $7,000, Property A1 is distributed to C in a current distribution. If Property A1 had been sold by the partnership at the time of the distribution, ABC would have recognized the $2,000 of remaining built-in gain under section 704(c)(1)(A) on the sale (fair market value of $7,000 less $5,000 adjusted tax basis). All of this gain would have been allocated to A. ABC would also have recognized a book loss of $3,000 ($10,000 original book value less $7,000 current fair market value of the property). Book loss in the amount of $2,000 would have been allocated equally between B and C. Under the remedial method, $2,000 of tax loss would also have been allocated equally to B and C to match their share of the book loss. As a result, $2,000 of gain would also have been allocated to A as an offsetting remedial allocation. A would have recognized $4,000 of total gain under section 704(c)(1)(A) on the sale of Property A1 ($2,000 of section 704(c) recognized gain plus $2,000 remedial gain). Therefore, A recognizes $4,000 of gain on the distribution of Property A1 to C under this section.

(b) *Character of gain or loss*—(1) *General rule*. Gain or loss recognized by the contributing partner under section 704(c)(1)(B) and this section has the same character as the gain or loss that would have resulted if the distributed property had been sold by the partnership to the distributee partner at the time of the distribution.

(2) *Example*. The following example illustrates the rule of this paragraph (b). Unless otherwise specified, partnership income equals partnership expenses (other than depreciation deductions for contributed property) for each year of the partnership, the fair market value of partnership property does not change, all distributions by the partnership are subject to section 704(c)(1)(B), and all partners are unrelated.

Example. Character of gain. (i) On January 1, 1995, A and B form partnership AB. A contributes $10,000 and Property A, nondepreciable real property with a fair market value of $10,000 and an adjusted tax basis of $4,000, in exchange for a 25 percent interest in partnership capital and profits. B contributes $60,000 cash for a 75 percent interest in partnership capital and profits.

(ii) On December 31, 1998, Property A is distributed to B in a current distribution. Property A is used in a trade or business of B.

(iii) A would have recognized $6,000 of gain under section 704(c)(1)(A) on a sale of Property A at the time of the distribution (the difference between the fair market value ($10,000) and the adjusted tax basis ($4,000) of the property at that time). Because Property A is not a capital asset in the hands of Partner B and B holds more than 50 percent of partnership capital and profits, the character of the gain on a sale of Property A to B would have been ordinary income under section 707(b)(2). Therefore, the character of the gain to A on the distribution of Property A to B is ordinary income.

(c) *Exceptions*—(1) *Property contributed on or before October 3, 1989*. Section 704(c)(1)(B) and this section do not apply to property contributed to the partnership on or before October 3, 1989.

(2) *Certain liquidations*. Section 704(c)(1)(B) and this section do not apply to a distribution of an interest in section 704(c) property to a partner other than the contributing partner in a liquidation of the partnership if—

(i) The contributing partner receives an interest in the section 704(c) property contributed by that partner (and no other property); and

(ii) The built-in gain or loss in the interest distributed to the contributing partner, determined immediately after the distribution, is equal to or greater than the built-in gain or loss on the property that would have been allocated to the contributing partner under section 704(c)(1)(A) and §1.704–3 on a sale of the contributed property to an unrelated party immediately before the distribution.

(3) *Section 708(b)(1)(B) termination*. Section 704(c)(1)(B) and this section do not apply to a deemed distribution of property caused by a termination of the partnership under section 708(b)(1)(B). See paragraph (a)(4)(ii) of this section for a special rule regarding a new five-year period for certain property deemed contributed to a new partnership following a termination of the partnership under section 708(b)(1)(B). See also §1.737–2(a) for a similar rule in the context of section 737.

(4) *Complete transfer to another partnership*. Section 704(c)(1)(B) and this section do not apply to a transfer by a partnership (transferor partnership) of all of its assets and liabilities to a second partnership (transferee partnership) in an exchange described in section 721, followed by a distribution of the interest in the transferee partnership in liquidation of the transferor partnership as part of the same plan or arrangement. A subsequent distribution of section 704(c) property by the transferee partnership to a partner of the transferee partnership is subject to section 704(c)(1)(B) to the same extent that a distribution by the transferor partnership would have been subject to section 704(c)(1)(B). See §1.737–2(b) for a similar rule in the context of section 737.

(5) *Incorporation of a partnership*. Section 704(c)(1)(B) and this section do not apply to an incorporation of a partnership by any method of incor-

poration (other than a method involving an actual distribution of partnership property to the partners followed by a contribution of that property to a corporation), provided that the partnership is liquidated as part of the incorporation transaction. See §1.737–2(c) for a similar rule in the context of section 737.

(6) *Undivided interests*. Section 704(c)(1)(B) and this section do not apply to a distribution of an undivided interest in property to the extent that the undivided interest does not exceed the undivided interest, if any, contributed by the distributee partner in the same property. See §1.737–2(d)(4) for the application of section 737 in a similar context. The portion of the undivided interest in property retained by the partnership after the distribution, if any, that is treated as contributed by the distributee partner, is reduced to the extent of the undivided interest distributed to the distributee partner.

(7) *Example*. The following example illustrates the rule of paragraph (c)(2) of this section. Unless otherwise specified, partnership income equals partnership expenses (other than depreciation deductions for contributed property) for each year of the partnership, the fair market value of partnership property does not change, all distributions by the partnership are subject to section 704(c)(1)(B), and all partners are unrelated.

Example. (i) On January 1, 1995, A and B form partnership AB, as equal partners. A contributes Property A, nondepreciable real property with a fair market value and adjusted tax basis of $20,000. B contributes Property B, nondepreciable real property with a fair market value of $20,000 and an adjusted tax basis of $10,000. Property B therefore has a built-in gain of $10,000 at the time of contribution.

(ii) On December 31, 1998, the partnership liquidates when the fair market value of Property A has not changed, but the fair market value of Property B has increased to $40,000.

(iii) In the liquidation, A receives Property A and a 25 percent interest in Property B. This interest in Property B has a fair market value of $10,000 to A, reflecting the fact that A was entitled to 50 percent of the $20,000 post-contribution appreciation in Property B. The partnership distributes to B a 75 percent interest in Property B with a fair market value of $30,000. B's basis in this portion of Property B is $10,000 under section 732(b). As a result, B has a built-in gain of $20,000 in this portion of Property B immediately after the distribution ($30,000 fair market value less $10,000 adjusted tax basis). This built-in gain is greater than the $10,000 of built-in gain in Property B at the time of contribution to the partnership. B therefore does not recognize any gain on the distribution of a portion of Property B to A under this section.

(d) *Special rules*—(1) *Nonrecognition transactions*. Property received by the partnership in exchange for section 704(c) property in a nonrecognition transaction is treated as the section 704(c) property for purposes of section 704(c)(1)(B) and this section to the extent that the property received is treated as section 704(c) property under §1.704–3(a)(8). See §1.737–2(d)(3) for a similar rule in the context of section 737.

(2) *Transfers of a partnership interest*. The transferee of all or a portion of the partnership interest of a contributing partner is treated as the contributing partner for purposes of section 704(c)(1)(B) and this section to the extent of the share of built-in gain or loss allocated to the transferee partner. See §1.704–3(a)(7).

(3) *Distributions of like-kind property*. If section 704(c) property is distributed to a partner other than the contributing partner and like-kind property (within the meaning of section 1031) is distributed to the contributing partner no later than the earlier of (i) 180 days following the date of the distribution to the non-contributing partner, or (ii) the due date (determined with regard to extensions) of the contributing partner's income tax return for the taxable year of the distribution to the noncontributing partner, the amount of gain or loss, if any, that the contributing partner would otherwise have recognized under section 704(c)(1)(B) and this section is reduced by the amount of built-in gain or loss in the distributed like-kind property in the hands of the contributing partner immediately after the distribution. The contributing partner's basis in the distributed like-kind property is determined as if the like-kind property were distributed in an unrelated distribution prior to the distribution of any other property distributed as part of the same distribution and is determined without regard to the increase in the contributing partner's adjusted tax basis in the partnership interest under section 704(c)(1)(B) and this section. See §1.707–3 for provisions treating the distribution of the like-kind property to the contributing partner as a disguised sale in certain situations.

(4) *Example*. The following example illustrates the rules of this paragraph (d). Unless otherwise specified, partnership income equals partnership expenses (other than depreciation deductions for contributed property) for each year of the partnership, the fair market value of partnership property does not change, all distributions by the partnership are subject to section 704(c)(1)(B), and all partners are unrelated.

Example. Distribution of like-kind property. (i) On January 1, 1995, A, B, and C form partnership ABC as equal partners. A contributes Property A, nondepreciable real property with a fair market value of $20,000 and an adjusted tax basis of $10,000. B and C each contribute $20,000 cash. The partnership subsequently buys Property X, nondepreciable real property of a like-kind to Property A with a fair market value and adjusted tax basis of $8,000. The fair market value of Property X subsequently increases to $10,000.

(ii) On December 31, 1998, Property A is distributed to B in a current distribution. At the same time, Property X is distributed to A in a current distribution. The distribution of Property X does not result in the contribution of Property A being properly characterized as a disguised sale to the partnership under §1.707–3. A's basis in Property X is $8,000 under section 732(a)(1). A therefore has $2,000 of built-in gain in Property X ($10,000 fair market value less $8,000 adjusted tax basis).

(iii) A would generally recognize $10,000 of gain under section 704(c)(1)(B) on the distribution of Property A, the difference between the fair market value ($20,000) of the property and its adjusted tax basis ($10,000). This gain is reduced, however, by the amount of the built-in gain of Property X in the hands of A. As a result, A recognizes only $8,000 of gain on the distribution of Property A to B under section 704(c)(1)(B) and this section.

(e) *Basis adjustments*—(1) *Contributing partner's basis in the partnership interest*. The basis of the contributing partner's interest in the partnership is increased by the amount of the gain, or decreased by the amount of the loss, recognized by the partner under section 704(c)(1)(B) and this section. This increase or decrease is taken into account in determining (i) the contributing partner's adjusted tax basis under section 732 for any property distributed to the partner in a distribution that is part of the same distribution as the distribution of the contributed property, other than like-kind property described in paragraph (d)(3) of this section (pertaining to the special rule for distributions of like-kind property), and (ii) the amount of the gain recognized by the contributing partner under section 731 or section 737, if any, on a distribution of money or property to the contributing partner that is part of the same distribution as the distribution of the contributed property. For a determination of basis in a distribution subject to section 737, see §1.737–3(a).

(2) *Partnership's basis in partnership property*. The partnership's adjusted tax basis in the distributed section 704(c) property is increased or decreased immediately before the distribution by the amount of gain or loss recognized by the contributing partner under section 704(c)(1)(B) and this section. Any increase or decrease in basis is therefore taken into account in determining the distributee partner's adjusted tax basis in the distributed property under section 732. For a determination of basis in a distribution subject to section 737, see §1.737–3(b).

(3) *Section 754 adjustments*. The basis adjustments to partnership property made pursuant to paragraph (e)(2) of this section are not elective and must be made regardless of whether the partnership has an election in effect under section 754. Any adjustments to the bases of partnership property (including the distributed section 704(c) property) under section 734(b) pursuant to a section 754 election must be made after (and must take into account) the adjustments to basis made under paragraph (e)(2) of this section. See §1.737–3(c)(4) for a similar rule in the context of section 737.

(4) *Example*. The following example illustrates the rules of this paragraph (e). Unless otherwise specified, partnership income equals partnership expenses (other than depreciation deductions for contributed property) for each year of the partnership, the fair market value of partnership property does not change, all distributions by the partnership are subject to section 704(c)(1)(B), and all partners are unrelated.

Example. *Basis adjustment*. (i) On January 1, 1995, A, B, and C form partnership ABC as equal partners. A contributes $10,000 cash and Property A, nondepreciable real property with a fair market value of $10,000 and an adjusted tax basis of $4,000. B and C each contribute $20,000 cash.

(ii) On December 31, 1998, Property A is distributed to B in a current distribution.

(iii) Under paragraph (a) of this section, A recognizes $6,000 of gain on the distribution of Property A because that is the amount of gain that would have been allocated to A under section 704(c)(1)(A) and §1.704–3 on a sale of Property A for its fair market value at the time of the distribution (fair market value of Property A ($10,000) less its adjusted tax basis at the time of distribution ($4,000)). The adjusted tax basis of A's partnership interest is increased from $14,000 to $20,000 to reflect this gain. The partnership's adjusted tax basis in Property A is increased from $4,000 to $10,000 immediately prior to its distribution to B. B's adjusted tax basis in Property A is therefore $10,000 under section 732(a)(1).

(f) *Anti-abuse rule*—(1) *In general*. The rules of section 704(c)(1)(B) and this section must be applied in a manner consistent with the purpose of section 704(c)(1)(B). Accordingly, if a principal purpose of a transaction is to achieve a tax result that is inconsistent with the purpose of section 704(c)(1)(B), the Commissioner can recast the transaction for federal tax purposes as appropriate to achieve tax results that are consistent with the purpose of section 704(c)(1)(B) and this section. Whether a tax result is inconsistent with the purpose of section 704(c)(1)(B) and this section must be determined based on all the facts and circumstances. See §1.737–4 for an anti-abuse rule and examples in the context of section 737.

(2) *Examples*. The following examples illustrate the anti-abuse rule of this paragraph (f). The examples set forth below do not delineate the boundaries of either permissible or impermissible types of transactions. Further, the addition of any facts or circumstances that are not specifically set forth in an example (or the deletion of any facts or circumstances) may alter the outcome of the transaction described in the example. Unless otherwise specified, partnership income equals partnership expenses (other than depreciation deductions for contributed property) for each year of the partnership, the fair market value of partnership property does not change, all distributions by the partnership are subject to section 704(c)(1)(B), and all partners are unrelated.

Example 1. Distribution in substance made within five-year period; results inconsistent with the purpose of section 704(c)(1)(B). (i) On January 1, 1995, A, B, and C form partnership ABC as equal partners. A contributes Property A, nondepreciable real property with a fair market value of $10,000 and an adjusted tax basis of $1,000. B and C each contributes $10,000 cash.

(ii) On December 31, 1998, the partners desire to distribute Property A to B in complete liquidation of B's interest in the partnership. If Property A were distributed at that time, however, A would recognize $9,000 of gain under section 704(c)(1)(B), the difference between the $10,000 fair market value and the $1,000 adjusted tax basis of Property A, because Property A was contributed to the partnership less than five years before December 31, 1998. On becoming aware of this potential gain recognition, and with a principal purpose of avoiding such gain, the partners amend the partnership agreement on December 31, 1998, and take any other steps necessary to provide that substantially all of the economic risks and benefits of Property A are borne by B as of December 31, 1998, and that substantially all of the economic risks and benefits of all other partnership property are borne by A and C. The partnership holds Property A until January 5, 2000, at which time it is distributed to B in complete liquidation of B's interest in the partnership.

(iii) The actual distribution of Property A occurred more than five years after the contribution of the property to the partnership. The steps taken by the partnership on December 31, 1998, however, are the functional equivalent of an actual distribution of Property A to B in complete liquidation of B's interest in the partnership as of that date. Section 704(c)(1)(B) requires recognition of gain when contributed section 704(c) property is in substance distributed to another partner within five years of its contribution to the partnership. Allowing a contributing partner to avoid section 704(c)(1)(B) through arrangements such as those in this *Example 1* that have the effect of a distribution of property within five years of the date of its contribution to the partnership would effectively undermine the purpose of section 704(c)(1)(B) and this section. As a result, the steps taken by the partnership on December 31, 1998, are treated as causing a distribution of Property A to B for purposes of section 704(c)(1)(B) on that date, and A recognizes gain of $9,000 under section 704(c)(1)(B) and this section at that time.

(iv) Alternatively, if on becoming aware of the potential gain recognition to A on a distribution of Property A on December 31, 1998, the partners had instead agreed that B would continue as a partner with no changes to the partnership agreement or to B's economic interest in partnership operations, the distribution of Property A to B on January 5, 2000, would not have been inconsistent with the purpose of section 704(c)(1)(B) and this section. In that situation, Property A would not have been distributed until after the expiration of the five-year period specified in section 704(c)(1)(B) and this section. Deferring the distribution of Property A until the end of the five-year period for a principal purpose of avoiding the recognition of gain under section 704(c)(1)(B) and this section is not inconsistent with the purpose of section 704(c)(1)(B). Therefore, A would not have recognized gain on the distribution of Property A in that case.

Example 2. Suspension of five-year period in manner consistent with the purpose of section 704(c)(1)(B). (i) A, B, and C form partnership ABC on January 1, 1995, to conduct bona fide business activities. A contributes Property A, nondepreciable real property with a fair market value of $10,000 and an adjusted tax basis of $1,000, in exchange for a 49.5 percent interest in partnership capital and profits. B contributes $10,000 in cash for a 49.5 percent interest in partnership capital and profits. C contributes cash for a 1 percent interest in partnership capital and profits. A and B are wholly owned subsidiaries of the same affiliated group and continue to control the management of Property A by virtue of their controlling interests in the partnership. The partnership is formed pursuant to a plan a principal purpose of which is to minimize the period of time that A would have to remain a partner with a potential acquiror of Property A.

(ii) On December 31, 1997, D is admitted as a partner to the partnership in exchange for $10,000 cash.

(iii) On January 5, 2000, Property A is distributed to D in complete liquidation of D's interest in the partnership.

(iv) The distribution of Property A to D occurred more than five years after the contribution of the property to the partnership. On these facts, however, a principal purpose of the transaction was to minimize the period of time that A would have to remain partners with a potential acquiror of Property A, and treating the five-year period of section 704(c)(1)(B) as running during a time when Property A was still effectively owned through the partnership by members of the contributing affiliated group of which A is a member is inconsistent with the purpose of section 704(c)(1)(B). Prior to the admission of D as a partner, the pooling of assets between A and B, on the one hand, and C, on the other hand, although sufficient to constitute ABC as a valid partnership for federal income tax purposes, is not a sufficient pooling of assets for purposes of running the five-year period with respect to the distribution of Property A to D. Allowing a contributing partner to avoid section 704(c)(1)(B) through arrangements such as those in this *Example 2* would have the effect of substantially nullifying the five-year requirement of section 704(c)(1)(B) and this section and elevating the form of the transaction over its substance. As a result, with respect to the distribution of Property A to D, the five-year period of section 704(c)(1)(B) is tolled until the admission of D as a partner on December 31, 1997. Therefore, the distribution of Property A occurred before the end of the five-year period of section 704(c)(1)(B), and A recognizes gain of $9,000 under section 704(c)(1)(B) on the distribution.

(g) *Effective date*. This section applies to distributions by a partnership to a partner on or after January 9, 1995.

Par. 3. Sections 1.737–1, 1.737–2, 1.737–3, 1.737–4, and 1.737–5 are added to read as follows:

§1.737–1 Recognition of precontribution gain.

(a) *Determination of gain*—(1) *In general*. A partner that receives a distribution of property (other than money) must recognize gain under section 737 and this section in an amount equal to the lesser of the excess distribution (as defined in paragraph (b) of this section) or the partner's net precontribution gain (as defined in paragraph (c) of this section). Gain recognized under section 737 and this section is in addition to any gain recognized under section 731.

(2) *Transactions to which section 737 applies*. Section 737 and this section apply only to the extent that a distribution by a partnership is a distribution to a partner acting in the capacity of a partner within the meaning of section 731, except that section 737 and this section do not apply to the extent that section 751(b) applies to the distribution.

(b) *Excess distribution*—(1) *Definition*. The excess distribution is the amount (if any) by which the fair market value of the distributed property (other than money) exceeds the distributee partner's adjusted tax basis in the partner's partnership interest.

(2) *Fair market value of property*. The fair market value of the distributed property is the price at which the property would change hands between a willing buyer and a willing seller at the time of the distribution, neither being under any compulsion to buy or sell and both having reasonable knowledge of the relevant facts. The fair market value that a partnership assigns to distributed property will be regarded as correct, provided that the value is reasonably agreed to among the partners in an arm's-length negotiation and the partners have sufficiently adverse interests.

(3) *Distributee partner's adjusted tax basis*—(i) *General rule*. In determining the amount of the excess distribution, the distributee partner's adjusted tax basis in the partnership interest includes any basis adjustment resulting from the distribution that is subject to section 737 (for example, adjustments required under section 752) and from any other distribution or transaction that is part of the same distribution, except for—

(A) The increase required under section 737(c)(1) for the gain recognized by the partner under section 737; and

(B) The decrease required under section 733(2) for any property distributed to the partner other than property previously contributed to the partnership by the distributee partner. See §1.704–4(e)(1) for a rule in the context of section 704(c)(1)(B). See also §1.737–3(b)(2) for a special rule for determining a partner's adjusted tax basis in distributed property previously contributed by the partner to the partnership.

(ii) *Advances or drawings*. The distributee partner's adjusted tax basis in the partnership interest is determined as of the last day of the partnership's taxable year if the distribution to which section 737 applies is properly characterized as an advance or drawing against the partner's distributive share of income. See §1.731–1(a)(1)(ii).

(c) *Net precontribution gain*—(1) *General rule*. The distributee partner's net precontribution gain is the net gain (if any) that would have been recognized by the distributee partner under section 704(c)(1)(B) and §1.704–4 if all property that had been contributed to the partnership by the distributee partner within five years of the distribution and is held by the partnership immediately before the distribution had been distributed by the partnership to another partner other than a partner who owns, directly or indirectly, more than 50 percent of the capital or profits interest in the partnership. See §1.704–4 for provisions determining a contributing partner's gain or loss under section 704(c)(1)(B) on an actual distribution of contributed section 704(c) property to another partner.

(2) *Special rules*—(i) *Property contributed on or before October 3, 1989*. Property contributed to the partnership on or before October 3, 1989, is not taken into account in determining a partner's net precontribution gain. See §1.704–4(c)(1) for a similar rule in the context of section 704(c)(1)(B).

(ii) *Section 734(b)(1)(A) adjustments*. For distributions to a distributee partner of money by a partnership with a section 754 election in effect that are part of the same distribution as the distribution of property subject to section 737, for purposes of paragraph (a) and (c)(1) of this section the distributee partner's net precontribution gain is reduced by the basis adjustments (if any) made to section 704(c) property contributed by the distributee partner under section 734(b)(1)(A). See §1.737–3(c)(4) for rules regarding basis adjustments for partnerships with a section 754 election in effect.

(iii) *Transfers of a partnership interest*. The transferee of all or a portion of a contributing partner's partnership interest succeeds to the transferor's net precontribution gain, if any, in an amount proportionate to the interest transferred. See §1.704–3(a)(7) and §1.704–4(d)(2) for similar provisions in the context of section 704(c)(1)(A) and section 704(c)(1)(B).

(iv) *Section 704(c)(1)(B) gain recognized in related distribution*. A distributee partner's net precontribution gain is determined after taking into account any gain or loss recognized by the partner under section 704(c)(1)(B) and §1.704–4 (or that would have been recognized by the partner except for the like-kind exception in section 704(c)(2) and §1.704–4(d)(3)) on an actual distribution to another partner of section 704(c) property contributed by the distributee partner that is part of the same distribution as the distribution to the distributee partner.

(v) *Section 704(c)(2) disregarded*. A distributee partner's net precontribution gain is determined without regard to the provisions of section 704(c)(2) and §1.704–4(d)(3) in situations in which the property contributed by the distributee partner is not actually distributed to another partner in a distribution related to the section 737 distribution.

(d) *Character of gain*. The character of the gain recognized by the distributee partner under section 737 and this section is determined by, and is proportionate to, the character of the partner's net precontribution gain. For this purpose, all gains and losses on section 704(c) property taken into account in determining the partner's net precontribution gain are netted according to their character. Character is determined at the partnership level for this purpose, and any character with a net negative amount is disregarded. The character of the partner's gain under section 737 is the same as, and in proportion to, any character with a net positive amount. Character for this purpose is determined as if the section 704(c) property had been sold by the partnership to an unrelated third party at the time of the distribution and includes any item that would have been taken into account separately by the contributing partner under section 702(a) and §1.702–1(a).

(e) *Examples*. The following examples illustrate the provisions of this section. Unless otherwise specified, partnership income equals partnership expenses (other than depreciation deductions for contributed property) for each year of the partnership, the fair market value of partnership property does not change, all distributions by the partnership are subject to section 737, and all partners are unrelated.

Example 1. Calculation of excess distribution and net precontribution gain. (i) On January 1, 1995, A, B, and C form partnership ABC as equal partners. A contributes Property A, depreciable real property with a fair market value of $30,000 and an adjusted tax basis of $20,000. B contributes Property B, nondepreciable real property with a fair market value and adjusted tax basis of $30,000. C contributes $30,000 cash.

(ii) Property A has 10 years remaining on its cost recovery schedule and is depreciated using the straight-line method. The partnership uses the traditional method for allocating items under section 704(c) described in §1.704–3(b)(1) for Property A. The partnership has book depreciation of $3,000 per year (10 percent of the $30,000 book basis in Property A) and each partner is allocated $1,000 of book depreciation per year (one-third of the total annual book depreciation of $3,000). The partnership also has tax depreciation of $2,000 per year (10 percent of the $20,000 adjusted tax basis in Property A). This $2,000 tax depreciation is allocated equally between B and C, the noncontributing partners with respect to Property A.

(iii) At the end of 1997, the book value of Property A is $21,000 ($30,000 initial book value less $9,000 aggregate book depreciation) and its adjusted tax basis is $14,000 ($20,000 initial tax basis less $6,000 aggregate tax depreciation).

(iv) On December 31, 1997, Property B is distributed to A in complete liquidation of A's partnership interest. The adjusted tax basis of A's partnership interest at that time is $20,000. The amount of the excess distribution is $10,000, the difference between the fair market value of the distributed Property B ($30,000) and A's adjusted tax basis in A's partnership interest ($20,000). A's net precontribution gain is $7,000, the difference between the book value of Property A ($21,000) and its adjusted tax basis at the time of the distribution ($14,000). A recognizes gain of $7,000 on the distribution, the lesser of the excess distribution and the net precontribution gain.

Example 2. Determination of distributee partner's basis. (i) On January 1, 1995, A, B, and C form general partnership ABC as equal partners. A contributes Property A, nondepreciable real property with a fair market value of $10,000 and an adjusted tax basis of $4,000. B and C each contributes $10,000 cash.

(ii) The partnership purchases Property B, nondepreciable real property with a fair market value of $9,000, subject to a $9,000 nonrecourse liability. This nonrecourse liability is allocated equally among the partners under section 752, increasing A's adjusted tax basis in A's partnership interest from $4,000 to $7,000.

(iii) On December 31, 1998, A receives $2,000 cash and Property B, subject to the $9,000 liability, in a current distribution.

(iv) In determining the amount of the excess distribution, the adjusted tax basis of A's partnership interest is adjusted to take into account the distribution of money and the shift in liabilities. A's adjusted tax basis is therefore increased to $11,000 for this purpose ($7,000 initial adjusted tax basis, less $2,000 distribution of money, less $3,000 (decrease in A's share of the $9,000 partnership liability), plus $9,000 (increase in A's individual liabilities)). As a result of this basis adjustment, the adjusted tax basis of A's partnership interest ($11,000) is greater than the fair market value of the distributed property ($9,000) and therefore, there is no excess distribution. A recognizes no gain under section 737.

Example 3. Net precontribution gain reduced for gain recognized under section 704(c)(1)(B). (i) On January 1, 1995, A, B, and C form partnership ABC as equal partners. A contributes Properties A1 and A2, nondepreciable real properties located in the United States each with a fair market value of $10,000 and an adjusted tax basis of $6,000. B contributes Property B, nondepreciable real property located outside the United States, with a fair market value and adjusted tax basis of $20,000. C contributes $20,000 cash.

(ii) On December 31, 1998, Property B is distributed to A in complete liquidation of A's interest and, as part of the same distribution, Property A1 is distributed to B in a current distribution.

(iii) A's net precontribution gain before the distribution is $8,000 ($20,000 fair market value of Properties A1 and A2 less $12,000 adjusted tax basis of such properties). A recognizes $4,000 of gain under section 704(c)(1)(B) and §1.704–4 on the distribution of Property A1 to B ($10,000 fair market value of Property A1 less $6,000 adjusted tax basis of Property A1). This gain is taken into account in determining A's excess distribution and net precontribution gain. As a result, A's net precontribution gain is reduced from $8,000 to $4,000, and the adjusted tax basis in A's partnership interest is increased by $4,000 to $16,000.

(iv) A recognizes gain of $4,000 on the receipt of Property B under section 737, an amount equal to the lesser of the excess distribution of $4,000 ($20,000 fair market value of Property B less $16,000 adjusted tax basis of A's interest in the partnership) and A's remaining net precontribution gain of $4,000.

Example 4. Character of gain. (i) On January 1, 1995, A, B, and C form partnership ABC as equal partners. A contributes the following nondepreciable property to the partnership:

	Fair Market Value	*Adjusted Tax Basis*
Property A1	$30,000	$20,000
Property A2	30,000	38,000
Property A3	10,000	9,000

(ii) The character of gain or loss on Property A1 and Property A2 is long-term, U.S.-source capital gain or loss. The character of gain on Property A3 is long-term, foreign-source capital gain. B contributes Property B, nondepreciable real property with a fair market value and adjusted tax basis of $70,000. C contributes $70,000 cash.

(iii) On December 31, 1998, Property B is distributed to A in complete liquidation of A's interest in the partnership. A recognizes $3,000 of gain under section 737, an amount equal to the excess distribution of $3,000 ($70,000 fair market value of Property B less $67,000 adjusted tax basis in A's partnership interest) and A's net precontribution gain of $3,000 ($70,000 aggregate fair market value of properties contributed by A less $67,000 aggregate adjusted tax basis of such properties).

(iv) In determining the character of A's gain, all gains and losses on property taken into account in determining A's net precontribution gain are netted according to their character and allocated to A's recognized gain under section 737 based on the relative proportions of the net positive amounts. U.S.-source and foreign-source gains must be netted separately because A would have been required to take such gains into account separately under section 702. As a result, A's net precontribution gain of $3,000 consists of $2,000 of net long-term, U.S.-source capital gain ($10,000 gain on Property A1 and $8,000 loss on Property A2) and $1,000 of net long-term, foreign-source capital gain ($1,000 gain on Property A3).

(v) The character of A's gain under paragraph (d) of this section is therefore $2,000 long-term, U.S.-source capital gain ($3,000 gain recognized under section 737 × $2,000 net long-term, U.S.-

source capital gain/$3,000 total net precontribution gain) and $1,000 long-term, foreign-source capital gain ($3,000 gain recognized under section 737 × $1,000 net long-term, foreign-source capital gain/$3,000 total net precontribution gain).

§1.737–2 Exceptions and special rules.

(a) *Section 708(b)(1)(B) terminations.* Section 737 and this section do not apply to a deemed distribution of property caused by a termination of the partnership under section 708(b)(1)(B). See §1.704–4(c)(3) for a similar rule in the context of section 704(c)(1)(B).

(b) *Transfers to another partnership*—(1) *Complete transfer.* Section 737 and this section do not apply to a transfer by a partnership (transferor partnership) of all of its assets and liabilities to a second partnership (transferee partnership) in an exchange described in section 721, followed by a distribution of the interest in the transferee partnership in liquidation of the transferor partnership as part of the same plan or arrangement. See §1.704–4(c)(4) for a similar rule in the context of section 704(c)(1)(B).

(2) *Certain divisive transactions.* Section 737 and this section do not apply to a transfer by a partnership (transferor partnership) of all of the section 704(c) property contributed by a partner to a second partnership (transferee partnership) in an exchange described in section 721, followed by a distribution as part of the same plan or arrangement of an interest in the transferee partnership (and no other property) in complete liquidation of the interest of the partner that originally contributed the section 704(c) property to the transferor partnership.

(3) *Subsequent distributions.* A subsequent distribution of property by the transferee partnership to a partner of the transferee partnership that was formerly a partner of the transferor partnership is subject to section 737 to the same extent that a distribution from the transferor partnership would have been subject to section 737.

(c) *Incorporation of a partnership.* Section 737 and this section do not apply to an incorporation of a partnership by any method of incorporation (other than a method involving an actual distribution of partnership property to the partners followed by a contribution of that property to a corporation), provided that the partnership is liquidated as part of the incorporation transaction. See §1.704–4(c)(5) for a similar rule in the context of section 704(c)(1)(B).

(d) *Distribution of previously contributed property*—(1) *General rule.* Any portion of the distributed property that consists of property previously contributed by the distributee partner (including property treated as contributed by the partner in connection with a termination of the partnership under section 708(b)(1)(B)) (*previously contributed property*) is not taken into account in determining the amount of the excess distribution or the partner's net precontribution gain. See §1.737–3(b)(2) for a special rule for determining the basis of previously contributed property in the hands of a distributee partner who contributed the property to the partnership.

(2) *Limitation for distribution of previously contributed interest in an entity.* An interest in an entity previously contributed to the partnership is not treated as previously contributed property to the extent that the value of the interest is attributable to property contributed to the entity after the interest was contributed to the partnership. The preceding sentence does not apply to the extent that the property contributed to the entity was contributed to the partnership by the partner that also contributed the interest in the entity to the partnership.

(3) *Nonrecognition transactions.* Property received by the partnership in exchange for contributed section 704(c) property in a nonrecognition transaction is treated as the contributed property with regard to the contributing partner for purposes of section 737 to the extent that the property received is treated as section 704(c) property under §1.704–3(a)(8). See §1.704–4(d)(1) for a similar rule in the context of section 704(c)(1)(B).

(4) *Undivided interests.* The distribution of an undivided interest in property is treated as the distribution of previously contributed property to the extent that the undivided interest does not exceed the undivided interest, if any, contributed by the distributee partner in the same property. See §1.704–4(c)(6) for the application of section 704(c)(1)(B) in a similar context. The portion of the undivided interest in property retained by the partnership after the distribution, if any, that is treated as contributed by the distributee partner, is reduced to the extent of the undivided interest distributed to the distributee partner.

(e) *Examples.* The following examples illustrate the rules of this section. Unless otherwise specified, partnership income equals partnership expenses (other than depreciation deductions for contributed property) for each year of the partnership, the fair market value of partnership property does not change, all distributions by the partnership are subject to section 737, and all partners are unrelated.

Example 1. Distribution of previously contributed property. (i) On January 1, 1995, A, B, and C form partnership ABC as equal partners. A contributes the following nondepreciable real property to the partnership:

	Fair Market Value	*Adjusted Tax Basis*
Property A1	$20,000	$10,000
Property A2	10,000	6,000

(ii) A's total net precontribution gain on the contributed property is $14,000 ($10,000 on Property A1 plus $4,000 on Property A2). B contributes $10,000 cash and Property B, nondepreciable real property with a fair market value and adjusted tax basis of $20,000. C contributes $30,000 cash.

(iii) On December 31, 1998, Property A2 and Property B are distributed to A in complete liquidation of A's interest in the partnership. Property A2 was previously contributed by A and is therefore not taken into account in determining the amount of the excess distribution or A's net precontribution gain. The adjusted tax basis of Property A2 in the hands of A is also determined under section 732 as if that property were the only property distributed to A.

(iv) As a result of excluding Property A2 from these determinations, the amount of the excess distribution is $10,000 ($20,000 fair market value of distributed Property B less $10,000 adjusted tax basis in A's partnership interest). A's net precontribution gain is also $10,000 ($14,000 total net precontribution gain less $4,000 gain with respect to previously contributed Property A2). A therefore recognizes $10,000 of gain on the distribution, the lesser of the excess distribution and the net precontribution gain.

Example 2. Distribution of a previously contributed interest in an entity. (i) On January 1, 1995, A, B, and C form partnership ABC as equal partners. A contributes Property A, nondepreciable real property with a fair market value of $10,000 and an adjusted tax basis of $5,000, and all of the stock of Corporation X with a fair market value and adjusted tax basis of $500. B contributes $500 cash and Property B, nondepreciable real property with a fair market value and adjusted tax basis of $10,000. Partner C contributes $10,500 cash. On December 31, 1996, ABC contributes Property B to Corporation X in a nonrecognition transaction under section 351.

(ii) On December 31, 1998, all of the stock of Corporation X is distributed to A in complete liquidation of A's interest in the partnership. The stock is treated as previously contributed property with respect to A only to the extent of the

$500 fair market value of the Corporation X stock contributed by A. The fair market value of the distributed stock for purposes of determining the amount of the excess distribution is therefore $10,000 ($10,500 total fair market value of Corporation X stock less $500 portion treated as previously contributed property). The $500 fair market value and adjusted tax basis of the Corporation X stock is also not taken into account in determining the amount of the excess distribution and the net precontribution gain.

(iii) A recognizes $5,000 of gain under section 737, the amount of the excess distribution ($10,000 fair market value of distributed property less $5,000 adjusted tax basis in A's partnership interest) and A's net precontribution gain ($10,000 fair market value of Property A less $5,000 adjusted tax basis in Property A).

Example 3. Distribution of undivided interest in property. (i) On January 1, 1995, A and B form partnership AB as equal partners. A contributes $500 cash and an undivided one-half interest in Property X. B contributes $500 cash and an undivided one-half interest in Property X.

(ii) On December 31, 1998, an undivided one-half interest in Property X is distributed to A in a current distribution. The distribution of the undivided one-half interest in Property X is treated as a distribution of previously contributed property because A contributed an undivided one-half interest in Property X. As a result, A does not recognize any gain under section 737 on the distribution.

§1.737–3 Basis adjustments; Recovery rules.

(a) *Distributee partner's adjusted tax basis in the partnership interest*. The distributee partner's adjusted tax basis in the partnership interest is increased by the amount of gain recognized by the distributee partner under section 737 and this section. This increase is not taken into account in determining the amount of gain recognized by the partner under section 737(a)(1) and this section or in determining the amount of gain recognized by the partner under section 731(a) on the distribution of money in the same distribution or any related distribution. See §1.704–4(e)(1) for a determination of the distributee partner's adjusted tax basis in a distribution subject to section 704(c)(1)(B).

(b) *Distributee partner's adjusted tax basis in distributed property*—(1) *In general*. The distributee partner's adjusted tax basis in the distributed property is determined under section 732(a) or (b) as applicable. The increase in the distributee partner's adjusted tax basis in the partnership interest under paragraph (a) of this section is taken into account in determining the distributee partner's adjusted tax basis in the distributed property other than property previously contributed by the partner. See §1.704–4(e)(2) for a determination of basis in a distribution subject to section 704(c)(1)(B).

(2) *Previously contributed property*. The distributee partner's adjusted tax basis in distributed property that the partner previously contributed to the partnership is determined as if it were distributed in a separate and independent distribution prior to the distribution that is subject to section 737 and §1.737–1.

(c) *Partnership's adjusted tax basis in partnership property*—(1) *Increase in basis*. The partnership's adjusted tax basis in eligible property is increased by the amount of gain recognized by the distributee partner under section 737.

(2) *Eligible property*. Eligible property is property that—

(i) Entered into the calculation of the distributee partner's net precontribution gain;

(ii) Has an adjusted tax basis to the partnership less than the property's fair market value at the time of the distribution;

(iii) Would have the same character of gain on a sale by the partnership to an unrelated party as the character of any of the gain recognized by the distributee partner under section 737; and

(iv) Was not distributed to another partner in a distribution subject to section 704(c)(1)(B) and §1.704–4 that was part of the same distribution as the distribution subject to section 737.

(3) *Method of adjustment*. For the purpose of allocating the basis increase under paragraph (c)(2) of this section among the eligible property, all eligible property of the same character is treated as a single group. Character for this purpose is determined in the same manner as the character of the recognized gain is determined under §1.737–1(d). The basis increase is allocated among the separate groups of eligible property in proportion to the character of the gain recognized under section 737. The basis increase is then allocated among property within each group in the order in which the property was contributed to the partnership by the partner, starting with the property contributed first, in an amount equal to the difference between the property's fair market value and its adjusted tax basis to the partnership at the time of the distribution. For property that has the same character and was contributed in the same (or a related) transaction, the basis increase is allocated based on the respective amounts of unrealized appreciation in such properties at the time of the distribution.

(4) *Section 754 adjustments*. The basis adjustments to partnership property made pursuant to paragraph (c)(1) of this section are not elective and must be made regardless of whether the partnership has an election in effect under section 754. Any adjustments to the bases of partnership property (including eligible property as defined in paragraph (c)(2) of this section) under section 734(b) pursuant to a section 754 election (other than basis adjustments under section 734(b)(1)(A) described in the following sentence) must be made after (and must take into account) the adjustments to basis made under paragraph (a) and paragraph (c)(1) of this section. Basis adjustments under section 734(b)(1)(A) that are attributable to distributions of money to the distributee partner that are part of the same distribution as the distribution of property subject to section 737 are made before the adjustments to basis under paragraph (a) and paragraph (c)(1) of this section. See §1.737–1(c)(2)(ii) for the effect, if any, of basis adjustments under section 734(b)(1)(A) on a partner's net precontribution gain. See also §1.704–4(e)(3) for a similar rule regarding basis adjustments pursuant to a section 754 election in the context of section 704(c)(1)(B).

(d) *Recovery of increase to adjusted tax basis*. Any increase to the adjusted tax basis of partnership property under paragraph (c)(1) of this section is recovered using any applicable recovery period and depreciation (or other cost recovery) method (including first-year conventions) available to the partnership for newly purchased property (of the type adjusted) placed in service at the time of the distribution.

(e) *Examples*. The following examples illustrate the rules of this section. Unless otherwise specified, partnership income equals partnership expenses (other than depreciation deductions for contributed property) for each year of the partnership, the fair market value of partnership property does not change, all distributions by the partnership are subject to section 737, and all partners are unrelated.

Example 1. Partner's basis in distributed property. (i) On January 1, 1995, A, B, and C form partnership ABC as equal partners. A contributes Property A, nondepreciable real property with a fair market value of $10,000 and an adjusted tax basis of $5,000. B contributes Property B, nondepreciable real property with a fair market value and adjusted tax basis of $10,000. C contributes $10,000 cash.

(ii) On December 31, 1998, Property B is distributed to A in complete liquidation of A's interest in the partnership. A recognizes $5,000 of gain under section 737, an amount equal to the excess distribution of $5,000 ($10,000 fair market value of Property B less $5,000 adjusted tax basis in A's partnership interest) and A's net precontribution gain of $5,000 ($10,000 fair market value of Property A less $5,000 adjusted tax basis of such property).

(iii) A's adjusted tax basis in A's partnership interest is increased by the $5,000 of gain recognized under section 737. This increase is taken into account in determining A's basis in the distributed property. Therefore, A's adjusted tax basis in distributed Property B is $10,000 under section 732(b).

Example 2. Partner's basis in distributed property in connection with gain recognized under section 704(c)(1)(B). (i) On January 1, 1995, A, B, and C form partnership ABC as equal partners. A contributes the following nondepreciable real property to the partnership:

	Fair Market Value	*Adjusted Tax Basis*
Property A1	$10,000	$5,000
Property A2	10,000	2,000

(ii) B contributes $10,000 cash and Property B, nondepreciable real property, with a fair market value and adjusted tax basis of $10,000. C contributes $20,000 cash.

(iii) On December 31, 1998, Property B is distributed to A in a current distribution and Property A1 is distributed to B in a current distribution. A recognizes $5,000 of gain under section 704(c)(1)(B) and §1.704–4 on the distribution of Property A1 to B, the difference between the fair market value of such property ($10,000) and the adjusted tax basis in distributed Property A1 ($5,000). The adjusted tax basis of A's partnership interest is increased by this $5,000 of gain under section 704(c)(1)(B) and §1.704–4(e)(1).

(iv) The increase in the adjusted tax basis of A's partnership interest is taken into account in determining the amount of the excess distribution. As a result, there is no excess distribution because the fair market value of Property B ($10,000) is less than the adjusted tax basis of A's interest in the partnership at the time of distribution ($12,000). A therefore recognizes no gain under section 737 on the receipt of Property B. A's adjusted tax basis in Property B is $10,000 under section 732(a)(1). The adjusted tax basis of A's partnership interest is reduced from $12,000 to $2,000 under section 733. See *Example 3* of §1.737–1(e).

Example 3. Partnership's basis in partnership property after a distribution with section 737 gain. (i) On January 31, 1995, A, B, and C form partnership ABC as equal partners. A contributes the following nondepreciable property to the partnership:

	Fair Market Value	*Adjusted Tax Basis*
Property A1	$1,000	$ 500
Property A2	4,000	1,500
Property A3	4,000	6,000
Property A4	6,000	4,000

(ii) The character of gain or loss on Properties A1, A2, and A3 is long-term, U.S.-source capital gain or loss. The character of gain on Property A4 is long-term, foreign-source capital gain. B contributes Property B, nondepreciable real property with a fair market value and adjusted tax basis of $15,000. C contributes $15,000 cash.

(iii) On December 31, 1998, Property B is distributed to A in complete liquidation of A's interest in the partnership. A recognizes gain of $3,000 under section 737, an amount equal to the excess distribution of $3,000 ($15,000 fair market value of Property B less $12,000 adjusted tax basis in A's partnership interest) and A's net precontribution gain of $3,000 ($15,000 aggregate fair market value of the property contributed by A less $12,000 aggregate adjusted tax basis of such property).

(iv) $2,000 of A's gain is long-term, foreign-source capital gain ($3,000 total gain under section 737 × $2,000 net long-term, foreign-source capital gain/$3,000 total net precontribution gain). $1,000 of A's gain is long-term, U.S.-source capital gain ($3,000 total gain under section 737 × $1,000 net long-term, U.S.-source capital gain/$3,000 total net precontribution gain).

(v) The partnership must increase the adjusted tax basis of the property contributed by A by $3,000. All property contributed by A is eligible property. Properties A1, A2, and A3 have the same character and are grouped into a single group for purposes of allocating this basis increase. Property A4 is in a separate character group.

(vi) $2,000 of the basis increase must be allocated to long-term, foreign-source capital assets because $2,000 of the gain recognized by A was long-term, foreign-source capital gain. The adjusted tax basis of Property A4 is therefore increased from $4,000 to $6,000. $1,000 of the increase must be allocated to Properties A1 and A2 because $1,000 of the gain recognized by A is long-term, U.S.-source capital gain. No basis increase is allocated to Property A3 because its fair market value is less than its adjusted tax basis. The $1,000 basis increase is allocated between Properties A1 and A2 based on the unrealized appreciation in each asset before such basis adjustment. As a result, the adjusted tax basis of Property A1 is increased by $167 ($1,000 × $500/$3,000) and the adjusted tax basis of Property A2 is increased by $833 ($1,000 × $2,500/3,000).

§1.737–4 Anti-abuse rule.

(a) *In general*. The rules of section 737 and §§1.737–1, 1.737–2, and 1.737–3 must be applied in a manner consistent with the purpose of section 737. Accordingly, if a principal purpose of a transaction is to achieve a tax result that is inconsistent with the purpose of section 737, the Commissioner can recast the transaction for federal tax purposes as appropriate to achieve tax results that are consistent with the purpose of section 737. Whether a tax result is inconsistent with the purpose of section 737 must be determined based on all the facts and circumstances. See §1.704–4(f) for an anti-abuse rule and examples in the context of section 704(c)(1)(B). The anti-abuse rule and examples under section 704(c)(1)(B) and §1.704–4(f) are relevant to section 737 and §§1.737–1, 1.737–2, and 1.737–3 to the extent that the net precontribution gain for purposes of section 737 is determined by reference to section 704(c)(1)(B).

(b) *Examples*. The following examples illustrate the rules of this section. The examples set forth below do not delineate the boundaries of either permissible or impermissible types of transactions. Further, the addition of any facts or circumstances that are not specifically set forth in an example (or the deletion of any facts or circumstances) may alter the outcome of the transaction described in the example. Unless otherwise specified, partnership income equals partnership expenses (other than depreciation deductions for contributed property) for each year of the partnership, the fair market value of partnership property does not change, all distributions by the partnership are subject to section 737, and all partners are unrelated.

Example 1. Increase in distributee partner's basis by temporary contribution; results inconsistent with the purpose of section 737. (i) On January 1, 1995, A, B, and C form partnership ABC as equal partners. A contributes Property A1, nondepreciable real property with a fair market value of $10,000 and an adjusted tax basis of $1,000. B contributes Property B, nondepreciable real property with a fair market value of $10,000 and an adjusted tax basis of $10,000. C contributes $10,000 cash.

(ii) On January 1, 1999, pursuant to a plan a principal purpose of which is to avoid gain under section 737, A transfers to the partnership Property A2, nondepreciable real property with a fair market value and adjusted tax basis of $9,000. A treats the transfer as a contribution to the partnership pursuant to section 721 and increases the adjusted tax basis of A's partnership interest from $1,000 to $10,000. On January 1, 1999, the partnership agreement is amended and all other necessary steps are taken so that substantially all of the economic risks and benefits of Property A2 are retained by A. On February 1, 1999, Property B is distributed to A in a current distribution. If the contribution of Property A2 is treated as a contribution to the partnership for purposes of section 737, there is no excess distribution because the fair market value of distributed Property B ($10,000) does not exceed the adjusted tax basis of A's interest in the partnership ($10,000), and therefore section 737 does not apply. A's adjusted tax basis in distributed Property B is $10,000 under section 732(a)(1) and the adjusted tax basis of A's partnership interest is reduced to zero under section 733.

(iii) On March 1, 2000, A receives Property A2 from the partnership in complete liquidation of A's interest in the partnership. A recognizes no gain on the distribution of Property A2 because the property was previously contributed property. See §1.737–2(d).

(iv) Although A has treated the transfer of Property A2 as a contribution to the partnership that increased the adjusted tax basis of A's interest in the partnership, it would be inconsistent with the purpose of section 737 to recognize the transfer as a contribution to the partnership. Section 737 requires recognition of gain when the value of distributed property exceeds the distributee partner's adjusted tax basis in the partnership interest. Section 737 assumes that any contribution or other transaction that affects a partner's adjusted tax basis in the partnership interest is a contribution or transaction in substance and is not engaged in with a principal purpose of avoiding recognition of gain under section 737. Because the transfer of Property A2 to the partnership was not a contribution in substance and was made with a principal purpose of avoiding recognition of gain under section 737, the Commissioner can disregard the contribution of Property A2 for this purpose. As a result, A recognizes gain of $9,000 under section 737 on the receipt of Property B, an amount equal to the lesser of the excess distribution of $9,000 ($10,000 fair market value of distributed Property B less the $1,000 adjusted tax basis of A's partnership interest, determined without regard to the transitory contribution of Property A2) or A's net precontribution gain of $9,000 on Property A1.

Example 2. Increase in distributee partner's basis; section 752 liability shift; results consistent with the purpose of section 737. (i) On January 1, 1995, A and B form general partnership AB as equal partners. A contributes Property A, nondepreciable real property with a fair market value of $10,000 and an adjusted tax basis of $1,000. B contributes Property B, nondepreciable real property with a fair market value and adjusted tax basis of $10,000. The partnership also borrows $10,000 on a recourse basis and purchases Property C. The $10,000 liability is allocated equally between A and B under section 752, thereby increasing the adjusted tax basis in A's partnership interest to $6,000.

(ii) On December 31, 1998, the partners agree that A is to receive Property B in a current distribution. If A were to receive Property B at that time, A would recognize $4,000 of gain under section 737, an amount equal to the lesser of the excess distribution of $4,000 ($10,000 fair market value of Property B less $6,000 adjusted tax basis in A's partnership interest) or A's net precontribution gain of $9,000 ($10,000 fair market value of Property A less $1,000 adjusted tax basis of Property A).

(iii) With a principal purpose of avoiding such gain, A and B agree that A will be solely liable for the repayment of the $10,000 partnership liability and take the steps necessary so that the entire amount of the liability is allocated to A under section 752. The adjusted tax basis in A's partnership interest is thereby increased from $6,000 to $11,000 to reflect A's share of the $5,000 of liability previously allocated to B. As a result of this increase in A's adjusted tax basis, there is no excess distribution because the fair market value of distributed Property B ($10,000) is less than the adjusted tax basis of A's partnership interest. Recognizing A's increased adjusted tax basis as a result of the shift in liabilities is consistent with the purpose of section 737 and this section. Section 737 requires recognition of gain only when the value of the distributed property exceeds the distributee partner's adjusted tax basis in the partnership interest. The $10,000 recourse liability is a bona fide liability of the partnership that was undertaken for a substantial business purpose and A's and B's agreement that A will assume responsibility for repayment of that debt has substance. Therefore, the increase in A's adjusted tax basis in A's interest in the partnership due to the shift in partnership liabilities under section 752 is respected, and A recognizes no gain under section 737.

§1.737–5 Effective date.

Sections 1.737–1, 1.737–2, 1.737–3, and 1.737–4 apply to distributions by a partnership to a partner on or after January 9, 1995.

Dated December 13, 1995.

Margaret Milner Richardson,
Commissioner of Internal Revenue.

Approved:

Leslie Samuels,
Assistant Secretary of the Treasury.

(Filed by the Office of the Federal Register on December 22, 1995, 8:45 a.m., and published in the issue of the Federal Register for December 26, 1995, 60 F.R. 66727)

Section 2601.—Tax Imposed

26 CFR 26.2601–1: Effective dates.

T.D. 8644

DEPARTMENT OF THE TREASURY
Internal Revenue Service
26 CFR Parts 26, 301 and 602

Generation-Skipping Transfer Tax

AGENCY: Internal Revenue Service, Treasury

ACTION: Final and temporary regulations

SUMMARY: This document contains final generation-skipping transfer (GST) tax regulations under chapter 13 of the Internal Revenue Code (Code), as added by section 1431 of the Tax Reform Act of 1986. Changes to the applicable law were made by the Tax Reform Act of 1986, the Technical and Miscellaneous Revenue Act of 1988, and the Revenue Reconciliation Act of 1989. The regulations are necessary to provide guidance to taxpayers so that they may comply with chapter 13 of the Code.

DATES: These regulations are effective December 27, 1995.

FOR FURTHER INFORMATION CONTACT: James F. Hogan, (202) 622-3090 (not a toll free number).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collection of information requirements contained in these final regulations have been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act (44 U.S.C. 3507) under control numbers 1545–0985 (relating to §§26.2601–1 and 26.2662–2) and 1545–1358 (relating to §§26.2632–1, 26.2642–1, 26.2642–2, 26.2642–3, 26.2642–4 and 26.2652–2). All of these paperwork requirements will be consolidated under control number 1545–0985. Responses to this collection of information are required to ensure the proper collection of the generation-skipping transfer tax.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection unless the collection of information displays a valid control number.

The estimated burden per respondent is 1 hour under control number 1545–0985. The time estimates for the reporting and recordkeeping requirements under control number 1545–1358 are included in the estimates of burden applicable to Forms 706, 706NA, 706GS(T), 706GS(D), 706GS(D–1), and 709.

Comments concerning the accuracy of this burden estimate and suggestions for reducing this burden should be directed to the Internal Revenue Service, Attn: IRS Reports Clearance Officer T:FP, Washington, DC 20224, and to the Office of Management and Budget, Attn: Desk Officer for the Department of Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503.

Books or records relating to this collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Background

On March 15, 1988, the IRS published in the Federal Register a notice of proposed rulemaking (53 FR 8469) by cross reference to Temporary Regulations published on the same date in the Federal Register (53 FR 8441) under §§2601 and 2662. Subsequently, on December 24, 1992, the IRS published a second notice of proposed rulemaking (57 FR 61353) amending the prior notice. Also, on December 24, 1992, the IRS published a notice of proposed rulemaking in the Federal Register (57 FR 61356) containing proposed regulations under §§2611, 2612, 2613, 2632, 2641, 2642, 2652, 2653, 2654, and 2663. The IRS received written and oral comments on the proposed regulations and, on April 21, 1993, a public hearing was held. These documents adopt final regulations with respect to these notices of proposed rulemaking.

The following is a discussion of the more significant revisions that were made.

Section 2601—Transitional Rules

Transfers after September 25, 1985 and before October 23, 1986

Section 26.2601–1(a)(2)(i), relating to inter vivos transfers made after September 25, 1985, and before October 23, 1986, clarifies that chapter 13 applies to inter vivos transfers that are subject to chapter 12 even though a gift tax is not actually paid because of, for example, the marital deduction or the unified credit.

Section 26.2601–1(a)(2)(ii) (which treats inter vivos transfers made after September 25, 1985, and before October 23, 1986, as if made on October 23, 1986) clarifies that the value of the transferred property for purposes of chapter 13 is determined as of the actual transfer date rather than as of the deemed transfer date of October 23, 1986.

Section 26.2601–1(a)(4) adds an example illustrating that §26.2601–1(a)(2) does not apply to transfers made under a revocable trust that becomes irrevocable by reason of the grantor's death after September 25, 1985, but before October 23, 1986. Those transfers are not subject to chapter 13 because they are in the nature of testamentary transfers that occurred prior to October 23, 1986.

Section 26.2601–1(b)(1)(ii)(C) clarifies that incidents of ownership in an insurance policy that are relinquished before September 25, 1985, are not to be taken into account in determining whether a trust is irrevocable for purposes of §26.2601–1(b)(1), which exempts trusts that were irrevocable on September 25, 1985, from the provisions of chapter 13.

Under §26.2601–1(b)(1)(iii)(A), a qualified terminable interest property (QTIP) trust that is grandfathered under §26.2601–1(b)(1) is treated as if the reverse QTIP election had been made under section 2652(a)(3). *Example 1* in §26.2601–1(b)(1)(iii)(B) has been revised to illustrate that the initial QTIP election under section 2523(f) need not be made before September 25, 1985, provided that the trust was irrevocable on that date. Further, §26.2601–1(b)(1)-(v)(C) has been revised to provide that in the case of a trust with respect to which a reverse QTIP election is deemed to have been made, the failure to exercise the right of reimbursement under section 2207A will not be treated as a constructive addition to the trust. This conforms the treatment of trusts that are irrevocable on September 25, 1985, with the rule provided in §26.2652–1(a)(3) which applies to trusts created after September 25, 1985.

In §26.2601–1(b)(2)(iv)(B), the phrase ''or to a generation-skipping trust'' has been added to eliminate any implication that the provision is limited to situations involving direct skips. The provision applies to all generation-skipping transfers.

Section 26.2601–1(b)(3)(iii) applies the transitional rules where the decedent was under a mental disability but had not been adjudged a mental incompetent. This section has been clarified to provide that any evidence submitted to establish the decedent's state of incompetency is not conclusive and is subject to examination. In addition, an example has been added to illustrate the transitional rules applicable in the case of mental incompetency.

Uniform statutory rule against perpetuities

The notice of proposed rulemaking published on December 24, 1992, (57 FR 61353) contained a proposed modification to §26.2601–1(b)(1)(v)(B)(*2*). Section 26.2601–1(b)(1)(v)(B)(*2*) provided that the exercise of a nongeneral power of appointment will not be treated as an addition to a grandfathered GST trust if the power is exercised in a manner that may not postpone or suspend the vesting, absolute ownership, or power of alienation of a interest in property for a period, measured from the date of creation of the trust, extending beyond any life in being at the date of creation of the trust plus a period of 21 years (perpetuities period).

The proposed modification to §26.2601–1(b)(1)(v)(B)(*2*), which is finalized in this document, provides that the exercise of a nongeneral power of appointment that validly postpones or suspends the vesting, absolute ownership, or power of alienation of an interest in property for a term of years that will not exceed 90 years (measured from the date of creation of the trust) will not be considered an exercise that postpones vesting, etc., beyond the perpetuities period. The modification takes into account the fact that many states have adopted the Uniform Statutory Rule Against Perpetuities (USRAP) which allows either a 90 year perpetuities period or the common law perpetuities period. Under §26.2601–1(b)(1)(v)(B)(*2*), as modified, the nongeneral power may not be exercised in a manner that postpones vesting, etc., for the longer of 90 years or the common law period (lives in being plus 21 years).

The discussion in the preamble published on December 24, 1992, indicates that USRAP has a ''wait and see'' aspect that is not appropriate for GST purposes because it will be necessary to determine the GST tax consequences of distributions and terminations at the time they occur. Thus, the preamble stated that, in order to comply with the regulation and avoid a constructive addition, it must be clear at the time the nongeneral power is exercised that the exercise may not postpone or suspend vesting, etc., beyond either lives in being plus 21 years or 90 years (but not the longer of the two periods). A commentator has pointed out that the USRAP invalidates any attempt to exercise a power for the longer of the two periods. Under the USRAP, it will be clear at the time the nongeneral power is exercised that the exercise may not postpone or suspend vesting, etc., beyond one of the two periods (but not both). Under the USRAP, the common law period (lives in being plus 21 years) is imposed in the event that the power holder exercises the power in a manner that attempts to suspend or postpone vesting, etc., for the longer of the two periods. Although the preamble published on December 24, 1992, may have been misleading in referring to a ‘‘wait and see’’ aspect of USRAP, the modification to §26.2601–1(b)(1)(v)-(B)(*2*) is not affected.

Section 2611 et. seq.—GST substantive rules

Definition of generation-skipping transfers

Section 26.2611–1 has been revised to clarify that, in determining whether an event is subject to the GST tax, reference must be made to the most recent transfer that was subject to Federal estate or gift tax. This is because the most recent transfer that was subject to estate or gift tax establishes the identity of the transferor, which in turn determines the identity of the skip persons and non-skip persons.

Definitions

Section 26.2612–1(a)(2)(i) of the proposed regulations provides generally that, for purposes of determining whether a transfer constitutes a direct skip, the generation assignment of a person who would otherwise be a skip person is redetermined by disregarding the intervening generation, if certain individuals have died prior to the transfer (*e.g.,* a predeceased child of the transferor). The section has been modified to provide that, if an individual who is a member of the intervening generation dies no later than 90 days after the transfer, the deceased individual is treated as having predeceased the transferor, if the governing instrument or applicable state law provides for such treatment.

Section 26.2612–1(a)(2)(ii) has been added to provide that, if a transferor makes an addition to an existing trust after the death of an individual described in paragraph (a)(2)(i) of that section (*i.e.,* an individual in the intervening generation), the additional property is treated as being held in a separate trust for purposes of chapter 13.

Section 2612(a)(1) defines the term *taxable termination* to mean the termination of an interest in property held in trust unless, among other things, at no time after such termination may a distribution (including distributions on termination) be made from the trust to a skip person. Section 26.2612–1(b)(1)-(iii), as proposed, has been revised to provide that, for purposes of applying this rule, potential distributions to skip persons are to be disregarded if the probability of occurrence is so remote as to be negligible. A similar rule has been applied to §26.2612–1(d)(2), regarding when a trust is considered a skip person. The probability that a distribution will occur is so remote as to be negligible only if it can be ascertained by actuarial standards that there is less than a 5 percent probability that the distribution will occur.

Section 26.2612–1(c)(2) has been added to clarify that the look-through rule in section 2651(e)(2) does not apply for purposes of determining whether a transfer from one trust to another trust is a taxable distribution. Thus, the transfer is treated as having been made to the recipient trust rather than to the beneficiaries of that trust. Accordingly, a transfer is a taxable distribution only if the recipient trust itself is a skip person.

Section 26.2612–1(e)(3) has been added to provide that, in determining whether a trust is a skip person, trust interests disclaimed pursuant to a qualified disclaimer described in section 2518 are not taken into account.

Example 3 has been added to §26.2612–1(f) to illustrate that a transfer to a trust pursuant to which a beneficiary who is a skip person has a withdrawal power is not a direct skip unless the trust is a skip person.

Example 9 has been added to §26.2612–1(f) to illustrate that a taxable termination may occur upon the distribution of the entire trust property (less amounts retained to pay a resulting GST tax and administration expenses).

Example 14 contained in §26.2612–1(f) of the proposed regulations illustrates that an individual is not treated as having an interest in a trust for purposes of Chapter 13, if the individual’s support obligation could be satisfied at the discretion of the trustee. This example has been renumbered as *Example 15* and has been clarified to provide that an individual will have an interest in the trust if the trustee is required to make distributions for the beneficiary’s support, in satisfaction of the individual’s support obligation.

Allocation of GST exemption

Under §26.2632–1(b)(2)(ii)(A) of the proposed regulations, a late allocation of GST exemption is effective on the date the Form 709 reporting the allocation is filed, and is deemed to precede in point of time any taxable event occurring on that date. This section has been revised to specify that the Form 709 is treated as filed on the date it is mailed to the appropriate IRS Service Center. Further, the late allocation may be made on a timely filed Form 709 reporting another transfer.

Section 26.2632–1(b)(2)(ii)(B) has been added to clarify how the GST exemption allocated on a Federal gift tax return (Form 709) is to be apportioned in the event that the amount allocated on the return exceeds the value of the transfers reported on the return.

Example 4 of §26.2632–1(b)(2)(iii) of the proposed regulations has been revised to better illustrate the effective date of a late allocation of GST exemption.

Example 5 of §26.2632–1(b)(2)(iii) has been added to illustrate the automatic allocation of GST exemption to inter vivos direct skips in situations where split gift treatment is elected on an initial gift tax return filed after its due date.

Section 26.2632–1(d)(1) has been revised to provide that a late allocation of GST exemption made by an executor with respect to an inter vivos transfer not included in the gross estate, is effective as of the date the allocation is filed. This rule does not apply to any automatic allocation under section 2632(b)(1). This revision conforms the regulation to section 2642(b)(3).

Estate tax inclusion period

As proposed, §26.2632–1(c)(2)(ii) provided that an estate tax inclusion period (ETIP) exists during the period in which the transferred property would have been includible in the transferor's gross estate had the transferor retained an interest held by the transferor's spouse, but only to the extent the spouse acquired the interest from the transferor in an inter vivos transfer that was not included in the transferor's taxable gifts or for which a deduction was allowed under section 2523. Commentators stated that there was no support in the statute for this spousal rule, and any such rule would require a legislative change. The final regulations eliminate this spousal rule and *Example 5* of §26.2632–1(c)(5).

Section 26.2632–1(c)(2)(ii)(A) has been added to provide that the ETIP rules do not apply when the possibility that the property will be included in the gross estate of the transferor (or the transferor's spouse) is so remote as to be negligible. Further, §26.2632–1(c)(2)(ii)(B) has been added to provide that transferred property will not be treated as being subject to inclusion in the transferor's spouse's gross estate, and thus, subject to an ETIP, where the only power possessed by the spouse is a right to withdraw no more than the greater of 5 percent or $5,000 of the trust's corpus and the withdrawal right terminates within 60 days of the transfer to the trust.

Section 26.2632–1(c)(5) *Example 3*, of the proposed regulations illustrates that if a transferor's spouse elects gift-splitting treatment with respect to the transferor's gift that is subject to an ETIP, the spouse is treated as the transferor of one-half of the gift. The example has been expanded to illustrate that, since the spouse's deemed transfer is subject to an ETIP, if the spouse dies prior to the termination of the trust, the spouse's executor may allocate GST exemption to the trust. However, the allocation will not be effective until the ETIP terminates on the transferor's death.

Erroneous allocations

Under the proposed regulations, allocations in excess of the amount of the property transferred are void. This treatment has been expanded under the final regulations. Thus, any allocation to a trust that has no GST potential at the time of the allocation, with respect to the transferor for whom the allocation is made, is also void. This provision is intended to prevent the wasting of GST exemption because of an erroneous allocation with respect to a testamentary or inter vivos transfer. A trust will have no GST potential only if there is no possibility that a GST will be made from the trust with respect to the transferor.

Determination of applicable fraction

Section 26.2642–1(b)(2) of the proposed regulations provided rules for determining the inclusion ratio with respect to a trust subject to an ETIP where GSTs are made from the trust during the ETIP. Comments were received that the rules were unclear regarding whether an ineffective allocation, *i.e.*, an allocation made prior to any distributions or terminations, would apply in determining the amount of the transferor's unused GST exemption, or whether such an allocation could be modified prior to an ETIP termination. In response to the comments, §26.2632–1(c)(1) (providing rules for the allocation of exemption with respect to a trust subject to an ETIP) and §26.2642–1(b)(2) clarify that an allocation made to a trust subject to an ETIP prior to any distribution or termination is not subject to modification or revocation. However, the allocation will not be effective, *i.e.*, the allocation does not operate to fix the inclusion ratio of the trust, at the time it is made. Rather, the allocation becomes effective as of the date of a subsequent distribution or termination. Section 26.2632–1(c)(5) *Example 2*, illustrates this point.

Section 26.2642–2 of the proposed regulations provides valuation rules for determining the denominator of the applicable fraction under section 2642. Section 26.2642–2(a)(1) of the final regulations specifies that, in the case of a timely allocation of GST exemption with respect to an inter vivos transfer, the denominator of the applicable fraction is the fair market value of the transferred property, as finally determined for gift tax purposes.

Section 26.2642–2(b)(1) of the proposed regulations provides special rules for determining the denominator of the applicable fraction in situations involving property subject to the special valuation rules contained in section 2032A. Under the proposed regulations, the special use value of the property could only be used in determining the applicable fraction if the property was transferred in a direct skip. Thus, a generation-skipping trust to which section 2032A property was transferred in a transfer that was not a direct skip would not receive the benefit of the favorable valuation rules of section 2032A in determining the applicable fraction with respect to the trust.

Comments stated that the proposed regulation was inconsistent with section 2642(b), which provides that the chapter 11 value must be used to determine the applicable fraction in the case of a testamentary transfer. Under the final regulations, the section 2032A value of property is to be used to determine the applicable fraction for a direct skip transfer and for a generation-skipping trust created in a transfer other than a direct skip.

In the event that additional estate tax is imposed under section 2032A(c) with respect to the property, then the applicable fraction is redetermined as of the transferor's date of death. Thus, the GST tax liability with respect to any direct skip, taxable termination, or taxable distribution occurring prior to the recapture event would be recomputed based on the redetermined applicable fraction, and an additional GST tax would be due. The taxation of any future GST transfers would also be based on the redetermined applicable fraction.

Sections 26.2642–2(b)(2) and (3) of the proposed regulations contain special rules for determining the denominator of the applicable fraction in situations involving residuary and pecuniary payments. Generally, in the case of a residual GST after the payment of a pecuniary amount, the denominator of the applicable fraction will be the estate tax value of the total assets available to satisfy the pecuniary payment less the amount of the pecuniary payment, provided the pecuniary payment carries ''appropriate interest'' as defined in §26.2642–2(b)(4). Under §26.2642–2(b)(4)(ii), the payment need not carry appropriate interest if, *inter alia*, the payment is irrevocably ''set aside'' within 15 months of the transferor's death. The final regulations clarify that this exception to the appropriate interest requirement applies only if the entire payment is set aside. Further, the payment is treated as set aside if the amount is segregated and held in a separate account pending distribution. Finally, under the proposed regulation, the appropriate interest requirement can be satisfied if a pro rata share of estate income is allocated to the pecuniary bequest. The final regulations clarify that the payment of income may be allocated pursuant to the terms of the governing instrument or applicable local law.

Section 26.2642–4(a)(3) of the proposed regulations addresses a situation where a lifetime allocation is made with respect to a trust when the trust was not subject to an ETIP, and the trust is subsequently included in the transferor's gross estate. The regulation has been revised to provide that, if additional GST exemption is allocated to the trust, the nontax portion of the trust is determined immediately after the date of the transferor's death. Also, if additional GST exemption is not allocated to the trust by the transferor's executor, the applicable fraction does not change, if the trust was not otherwise subject to an ETIP at the time the previous allocation of GST exemption was made. Further, where such property is included in the gross estate, the denominator of the applicable fraction is reduced to reflect any federal or state estate or inheritance tax paid by the trust.

Definition of transferor

Section 26.2652–1(a)(1) of the proposed regulations, defining *transferor*, has been revised to specify that a surviving spouse is treated as the transferor of a qualified domestic trust (QDOT) described in section 2056A that is included in the surviving spouse's gross estate for federal estate tax purposes, assuming the trust is not subject to a reverse QTIP election under section 2652(a)(3). The surviving spouse is also the transferor of any QDOT created by the surviving spouse under section 2056(d)(2)(B).

Section 26.2652–1(a)(4), as proposed, provided that the creator of a special power of appointment will be treated as making a transfer subject to estate or gift tax (and thus be considered a transferor) if the holder of the power exercised the power in a manner that may postpone vesting, etc., of the property subject to the power beyond the permissible perpetuities period. This result is inconsistent with section 2041(a)(3), which treats the holder of the power as making a transfer under these circumstances. Accordingly, the regulation has been revised to provide that the holder of the power will be treated as making a taxable transfer, if the holder exercises the power in the manner prescribed.

Section 26.2652–1(a)(5) has been added to specify that where a donor's spouse consents to have the donor's gift treated as made one-half by the spouse, then for purposes of chapter 13, the spouse is treated as the transferor of one-half of the property transferred by the donor. Thus, if a donor transfers property to a trust and retains a *qualified interest* as defined in section 2702(b), with the remainder to a grandchild, a consenting spouse would be treated as the transferor of one-half the entire property. It was suggested that the spouse should only be treated as the transferor of that portion of the trust corresponding to one-half of the actuarial value of the interest passing to the grandchild, since under section 2513, only one-half the gift to the grandchild may be treated as made by the consenting spouse. However, treating the consenting spouse as the transferor of one-half of the entire trust is consistent with the general treatment accorded other split-interest transfers. For example, if a transferor transferred property in trust retaining an interest that qualified under section 2702(b), with the remainder to the transferor's grandchild, the transferor would be considered the transferor of the entire trust for purposes of chapter 13, notwithstanding that, from a technical standpoint, only the actuarial value of the gift to the grandchild is subject to gift tax at the time of the transfer.

Example 8 in §26.2652–1(a)(6) has been added illustrating that a surviving spouse will not be treated as making a contribution to a QTIP trust that is included in the spouse's gross estate and is subject to a reverse QTIP election, where the spouse directs in the will that the estate tax generated by the inclusion of the trust is to be paid from the spouse's probate estate.

Separate shares treated as separate trusts

Section 26.2654–1 of the proposed regulations provides rules under which ''separate shares'' of a single trust that satisfy the requirements of the regulations will be recognized as separate trusts for GST purposes.

Under the proposed regulations, a mandatory payment of a pecuniary amount is treated as a separate share of a trust (and thus, a separate trust for GST purposes) if certain conditions are satisfied. The section is clarified to specify that a mandatory payment is a payment that is nondiscretionary and noncontingent; *i.e.,* the payment must be made in all events.

A sentence was added to *Example 3*, now contained in §26.2654–1(a)(5), to clarify that, where a decedent's probate estate pours over to a revocable trust, and then amounts are distributed pursuant to the terms of the trust, the distributions will be treated as separate shares for purposes of chapter 13.

Example 4, now contained in §26.2654–1(a)(5), has been revised to specify that the bequest of a pecuniary amount payable in kind is not treated as a separate share of the trust, since, under the facts presented, neither the trust nor local law requires that the assets distributed in satisfaction of the bequest fairly reflect net appreciation and depreciation. This is the result regardless of whether the assets are distributed within 15 months of the transferor's death.

Comments received suggested that the regulations should allow separate trust treatment whenever a single inter vivos trust was recognized as separate trusts under local law. For example, an inter vivos trust provides income to child for life, but when each grandchild reaches age 35, a separate trust is to be established for the child, the grandchild, and the grandchild's issue. Comments suggested that the Service should recognize each trust established when a grandchild reaches age 35 as a separate trust, and allow a late allocation of GST exemption specifically to that trust when severance occurs.

This suggestion was rejected. Generally, the adoption of this approach would effectively allow the allocation of GST exemption to specific distributions from a GST trust, rather than to the entire trust. This result would be contrary to the clear language of the statute. See, *e.g.,* sections 2642(a)(1)(A) and (a)(2).

Division of a single trust into separate trusts

Under §26.2654–1(c) of the proposed regulations, a testamentary trust could be severed into several parts, provided the severance was commenced prior to the filing of the estate tax return.

Further, the new trusts created pursuant to the severance had to be identical to the old trusts. For example, a testamentary trust providing for income to spouse, remainder to be divided equally between child and grandchild could only be severed into two trusts both providing income to spouse with the remainder to be divided between child and grandchild. Finally, an inter vivos trust could not be severed unless it consisted of separate shares, or different transferors had contributed to the trust.

The regulation has been clarified to specify that the division of a single trust that is included in the transferor's gross estate will be recognized if either: (1) the single trust consists of separate shares and is thus, treated as separate trusts; or (2) the single trust, although not consisting of separate shares, is severed into separate trusts pursuant to a direction in the governing instrument providing that the trust is to be divided into separate trusts on the transferor's death; or (3) the governing instrument does not require or direct severance but the trust is severed pursuant to the discretionary authority of the trustee granted under the governing instrument or local law.

The final regulations provide that the trusts resulting from the severance of a single testamentary trust need not be identical. Thus, if the trust provides income to spouse, remainder to child and grandchild, the trust may be severed to create two trusts, one with income to spouse, remainder to child and a second with income to spouse remainder to grandchild. This result could be achieved through proper estate planning in any event. However, the regulations make it clear that the resulting trusts must provide for the same succession of interests as provided for under the original trusts. Thus, a trust providing for an income interest to a child, with remainder to a grandchild, could not be divided into one trust for the child (equal in value to the child's income interest) and another for the grandchild.

The proposed regulations provided that the new trusts must be funded with a fractional share of each and every asset held by the original single trust. The provision has been revised to provide that the new trusts may also be funded on a nonpro rata basis, based on the fair market value of the assets selected on the date of severance. Thus, the executor or trustee may select the assets with which to fund each trust, and need not fractionalize each asset.

An example has been added to illustrate that, if a revocable trust included in the transferor's gross estate is, under the terms of the trust, divided into multiple trusts on the transferor's death, then each trust established will be treated as a separate trust for GST purposes.

Due date of return

New §26.2662–1(d)(2) has been added to provide that the due date of the return with respect to a taxable termination subject to an election under section 2624(c) (relating to alternate valuation in accordance with section 2032) is April 15th of the following year in which the taxable termination occurred or on or before the 15th day of the tenth month following the month in which the death that resulted in the taxable termination occurred, whichever is later.

Application of chapter 13 to nonresident aliens

Section 2663(2) requires that the Commissioner prescribe regulations, consistent with the provisions of chapters 11 and 12, providing for the application of the GST tax to a nonresident alien (NRA). In general, under §26.2663–2(b) as proposed, the GST tax applied to inter vivos and testamentary direct skip transfers by a NRA, to the extent that the transferred property was U.S. situs property such that the transfer was subject to a gift tax (in the case of inter vivos transfers) or an estate tax (in the case of testamentary transfers). Similarly, in the case of transfers in trust, chapter 13 applied to taxable terminations and distributions to the extent the initial transfer to the trust (whether inter vivos or testamentary) consisted of U.S. situs property, such that the initial transfer was subject to the gift or estate tax. This was the case regardless of the situs of the property at the time of the actual distribution or termination and regardless of the residency or citizenship of the skip person receiving the beneficial interest or property.

Under §26.2663–2(c) as proposed, if the property involved in a generation-skipping transfer was not situated in the U.S. at the time of the initial transfer, the generation-skipping transfer was still subject to the GST tax if: (1) at the time of the direct skip, taxable termination or distribution, the property passes to a skip person who is a U.S. resident or citizen; and (2) at the time of the initial transfer to the skip person or trust, a lineal descendant of the transferor, who is a lineal ancestor of the skip person, was a resident or citizen of the U.S. This rule applied regardless of the situs of the property at the time of the actual distribution or termination. Section 26.2663–2(f) of the proposed regulations provided for the automatic allocation of a NRA's $1,000,000 GST exemption regardless of whether the transfer was a direct skip.

Thus, the proposed regulations subjected non-U.S. situs property to the GST tax based on the status of the skip person/recipient of the property at the time the property was received, and the status of the generation that was skipped at the time of the initial transfer to the trust or skip person.

Many comments were critical of this approach. In general, these comments emphasized that the estate and gift tax provisions subject transfers by NRAs to transfer tax based on the situs of the property, not the status of the recipient. Therefore, the proposed regulations conflict with section 2663, which provides that the regulations should be consistent with the principles of chapters 11 and 12 of the Internal Revenue Code (Code). Further, the commentators argued that treating a NRA who transfers non-U.S. situs property as a transferor for GST tax purposes would conflict with the definition of *transferor* under section 2652, since the transfer would not be subject to estate or gift tax. Under section 2652, an individual is a transferor only to the extent the transfer is subject to U.S. gift tax or estate tax.

The proposed regulations have been revised to address these concerns. Thus, the rules in the proposed regulations applying chapter 13 to transfers of property that were not subject to estate or gift tax have been eliminated. Under the final regulations, the application of the GST tax will be limited to situations where an estate or gift tax is imposed on the property. Thus, the GST tax will apply to inter vivos and testamentary direct skip transfers by a NRA transferor to the extent a gift tax is imposed on the transfer (in the case of an inter vivos transfer) or the transferred property is included in the transferor's gross estate (in the case of a testamentary direct skip). In the case of taxable terminations and taxable distributions, chapter 13 will apply to the extent a gift tax was imposed on the initial transfer to the trust, or the property was included in the transferor's gross estate. Accordingly, under the final regulations (in the absence of a situation involving an ETIP), the application of Chapter 13 is generally dependent on the situs of the property at the time of the initial transfer. The regulations contain special rules for determining the applicable fraction and inclusion ratio where a trust is funded with both U.S. and foreign situs property.

In general, the rules of §26.2632–1 apply with respect to the allocation of the exemption. However, the ETIP rule provided in §26.2632–1(c) applies only if the property transferred by the NRA is subsequently included in the transferor's gross estate. The final regulations provide transitional relief with respect to NRA's who made GST transfers and relied on the automatic allocation rules in the proposed regulations.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in EO 12866. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) and the Regulatory Flexibility Act (5 U.S.C. chapter 6) do not apply to these regulations, and therefore, a Regulatory Flexibility Analysis is not required. Pursuant to section 7805(f) of the Internal Revenue Code, the notice of proposed rulemaking preceding these regulations was submitted to the Small Business Administration for comment on its impact on small business.

Drafting Information

The principal author of these regulations is James F. Hogan, Office of the Chief Counsel, IRS. Other personnel from the IRS and Treasury Department participated in their development.

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Adoption of Amendments to the Regulations

Accordingly, 26 CFR parts 26, 301, and 602 are amended as follows:

Paragraph 1. Part 26 is revised to read as follows:

PART 26—GENERATION-SKIPPING TRANSFER TAX REGULATIONS UNDER THE TAX REFORM ACT OF 1986

Authority: 26 U.S.C. 7805 and 26 U.S.C. 2663.

Section 26.2632–1 also issued under 26 U.S.C. 2632 and 2663.

Section 26.2642–4 also issued under 26 U.S.C. 2632 and 2663.

Section 26.2662–1 also issued under 26 U.S.C. 2662.

Section 26.2663–2 also issued under 26 U.S.C. 2632 and 2663.

§26.2600–1 Table of contents.

26.2601–1 Effective dates.

(a) *Transfers subject to the generation-skipping transfer tax*—(1) *In general*. Except as otherwise provided in this section, the provisions of chapter 13 of the Internal Revenue Code of 1986 (Code) apply to any generation-skipping transfer (as defined in section 2611) made after October 22, 1986.

(2) *Certain transfers treated as if made after October 22, 1986*. Solely

for purposes of chapter 13, an inter vivos transfer is treated as if it were made on October 23, 1986, if it was—

(i) Subject to chapter 12 (regardless of whether a tax was actually incurred or paid); and

(ii) Made after September 25, 1985, but before October 23, 1986. For purposes of this paragraph, the value of the property transferred shall be the value of the property on the date the property was transferred.

(3) *Certain trust events treated as if occurring after October 22, 1986*. For purposes of chapter 13, if an inter vivos transfer is made to a trust after September 25, 1985, but before October 23, 1986, any subsequent distribution from the trust or termination of an interest in the trust that occurred before October 23, 1986, is treated as occurring immediately after the deemed transfer on October 23, 1986. If more than one distribution or termination occurs with respect to a trust, the events are treated as if they occurred on October 23, 1986, in the same order as they occurred. See paragraph (b)(1)(iv)(B) of this section for rules determining the portion of distributions and terminations subject to tax under chapter 13. This paragraph (a)(3) does not apply to transfers to trusts not subject to chapter 13 by reason of the transition rules in paragraphs (b)(2) and (3) of this section. The provisions of this paragraph (a)(3) do not apply in determining the value of the property under chapter 13.

(4) *Example*. The following example illustrates the principle that paragraph (a)(2) of this section is not applicable to transfers under a revocable trust that became irrevocable by reason of the transferor's death after September 25, 1985, but before October 23, 1986:

Example. T created a revocable trust on September 30, 1985, that became irrevocable when T died on October 10, 1986. Although the trust terminated in favor of a grandchild of T, the transfer to the grandchild is not treated as occurring on October 23, 1986, pursuant to paragraph (a)(2) of this section because it is not an inter vivos transfer subject to chapter 12. The transfer is not subject to chapter 13 because it is in the nature of a testamentary transfer that occurred prior to October 23, 1986.

(b) *Exceptions*—(1) *Irrevocable trusts*—(i) *In general*. The provisions of chapter 13 do not apply to any generation-skipping transfer under a trust (as defined in section 2652(b)) that was irrevocable on September 25, 1985. The rule of the preceding sentence does not apply to a pro rata portion of any generation-skipping transfer under an irrevocable trust if additions are made to the trust after September 25, 1985. See paragraph (b)(1)(iv) of this section for rules for determining the portion of the trust that is subject to the provisions of chapter 13.

(ii) *Irrevocable trust defined*—(A) *In general*. Unless otherwise provided in either paragraph (b)(1)(ii)(B) or (C) of this section, any trust (as defined in section 2652(b)) in existence on September 25, 1985, is considered an irrevocable trust.

(B) *Property includible in the gross estate under section 2038*. For purposes of this chapter a trust is not an irrevocable trust to the extent that, on September 25, 1985, the settlor held a power with respect to such trust that would have caused the value of the trust to be included in the settlor's gross estate for Federal estate tax purposes by reason of section 2038 (without regard to powers relinquished before September 25, 1985) if the settlor had died on September 25, 1985. A trust is considered subject to a power on September 25, 1985, even though the exercise of the power was subject to the precedent giving of notice, or even though the exercise could take effect only on the expiration of a stated period, whether or not on or before September 25, 1985, notice had been given or the power had been exercised. A trust is not considered subject to a power if the power is, by its terms, exercisable only on the occurrence of an event or contingency not subject to the settlor's control (other than the death of the settlor) and if the event or contingency had not in fact taken place on September 25, 1985.

(C) *Property includible in the gross estate under section 2042*. A policy of insurance on an individual's life that is treated as a trust under section 2652(b) is not considered an irrevocable trust to the extent that, on September 25, 1985, the insured possessed any incident of ownership (as defined in §20.2042–1(c) of this chapter, and without regard to any incidents of ownership relinquished before September 25, 1985), that would have caused the value of the trust, (*i.e.*, the insurance proceeds) to be included in the insured's gross estate for Federal estate tax purposes by reason of section 2042, if the insured had died on September 25, 1985.

(D) *Examples*. The following examples illustrate the application of this paragraph (b)(1):

Example 1. Section 2038 applicable. On September 25, 1985, T, the settlor of a trust that was created before September 25, 1985, held a testamentary power to add new beneficiaries to the trust. T held no other powers over any portion of the trust. The testamentary power held by T would have caused the trust to be included in T's gross estate under section 2038 if T had died on September 25, 1985. Therefore, the trust is not an irrevocable trust for purposes of this section.

Example 2. Section 2038 not applicable when power held by a person other than settlor. On September 25, 1985, S, the spouse of the settlor of a trust in existence on that date, had an annual right to withdraw a portion of the principal of the trust. The trust was otherwise irrevocable on that date. Because the power was not held by the settlor of the trust, it is not a power described in section 2038. Thus, the trust is considered an irrevocable trust for purposes of this section.

Example 3. Section 2038 not applicable. In 1984, T created a trust and retained the right to expand the class of remaindermen to include any of T's afterborn grandchildren. As of September 25, 1985, all of T's grandchildren were named remaindermen of the trust. Since the exercise of T's power was dependent on there being afterborn grandchildren who were not members of the class of remaindermen, a contingency that did not exist on September 25, 1985, the trust is not considered subject to the power on September 25, 1985, and is an irrevocable trust for purposes of this section. The result is not changed even if grandchildren are born after September 25, 1985, whether or not T exercises the power to expand the class of remaindermen.

Example 4. Section 2042 applicable. On September 25, 1985, T purchased an insurance policy on T's own life and designated child, C, and grandchild, GC, as the beneficiaries. T retained the power to obtain from the insurer a loan against the surrender value of the policy. T's insurance policy is a trust (as defined in section 2652(b)) for chapter 13 purposes. The trust is not considered an irrevocable trust because, on September 25, 1985, T possessed an incident of ownership that would have caused the value of the policy to be included in T's gross estate under section 2042 if T had died on that date.

Example 5. Trust partially irrevocable. In 1984, T created a trust naming T's grandchildren as the income and remainder beneficiaries. T retained the power to revoke the trust as to one-half of the principal at any time prior to T's death. T retained no other powers over the trust principal. T did not die before September 25, 1985, and did not exercise or release the power before that date. The half of the trust not subject to T's power to revoke is an irrevocable trust for purposes of this section.

(iii) *Trust containing qualified terminable interest property*—(A) *In general*. For purposes of chapter 13, a trust described in paragraph (b)(1)(ii) of this section that holds qualified terminable interest property by reason of an election under section 2056(b)(7) or section 2523(f) (made either on, before or after September 25, 1985) is treated in the same manner as if the decedent spouse or the donor spouse (as the case may be) had made an election under section 2652(a)(3). Thus, transfers from such trusts are not subject to chapter 13, and the decedent spouse or the donor spouse (as the case may be) is treated as the transferor of such property. The rule of this paragraph (b)(1)(iii) does not apply to that portion of the trust that is subject to chapter 13 by reason of an addition to the trust occurring after September 25, 1985. See §26.2652–2(a) for rules where an election under section 2652(a)(3) is made. See §26.2652–2(c) for rules where a portion of a trust is subject to an election under section 2652(a)(3).

(B) *Examples*. The following examples illustrate the application of this paragraph (b)(1)(iii):

Example 1. QTIP election made after September 25, 1985. On March 28, 1985, T established a trust. The trust instrument provided that the trustee must distribute all income annually to T's spouse, S, during S's life. Upon S's death, the remainder is to be distributed to GC, the grandchild of T and S. On April 15, 1986, T elected under section 2523(f) to treat the property in the trust as qualified terminable interest property. On December 1, 1987, S died and soon thereafter the trust assets were distributed to GC. Because the trust was irrevocable on September 25, 1985, the transfer to GC is not subject to tax under chapter 13. T is treated as the transferor with respect to the transfer of the trust assets to GC in the same manner as if T had made an election under section 2652(a)(3) to reverse the effect of the section 2523(f) election for chapter 13 purposes.

Example 2. Section 2652(a)(3) election deemed to have been made. Assume the same facts as in *Example 1*, except the trust instrument provides that after S's death all income is to be paid annually to C, the child of T and S. Upon C's death, the remainder is to be distributed to GC. C died on October 1, 1992, and soon thereafter the trust assets are distributed to GC. Because the trust was irrevocable on September 25, 1985, the termination of C's interest is not subject to chapter 13.

(iv) *Additions to irrevocable trusts*—(A) *In general*. If an addition is made after September 25, 1985, to an irrevocable trust which is excluded from chapter 13 by reason of paragraph (b)(1) of this section, a pro rata portion of subsequent distributions from (and terminations of interests in property held in) the trust is subject to the provisions of chapter 13. If an addition is made, the trust is thereafter deemed to consist of two portions, a portion not subject to chapter 13 (the non-chapter 13 portion) and a portion subject to chapter 13 (the chapter 13 portion), each with a separate inclusion ratio (as defined in section 2642(a)). The non-chapter 13 portion represents the value of the assets of the trust as it existed on September 25, 1985. The applicable fraction (as defined in section 2642(a)(2)) for the non-chapter 13 portion is deemed to be 1 and the inclusion ratio for such portion is 0. The chapter 13 portion of the trust represents the value of all additions made to the trust after September 25, 1985. The inclusion ratio for the chapter 13 portion is determined under section 2642. This paragraph (b)(1)(iv)(A) requires separate portions of one trust only for purposes of determining inclusion ratios. For purposes of chapter 13, a constructive addition under paragraph (b)(1)(v) of this section is treated as an addition. See paragraph (b)(4) of this section for exceptions to the additions rule of this paragraph (b)(1)(iv). See §26.2654–1(a)(2) for rules treating additions to a trust by an individual other than the initial transferor as a separate trust for purposes of chapter 13.

(B) *Terminations of interests in and distributions from trusts*. Where a termination or distribution described in section 2612 occurs with respect to a trust to which an addition has been made, the portion of such termination or distribution allocable to the chapter 13 portion is determined by reference to the allocation fraction, as defined in paragraph (b)(1)(iv)(C) of this section. In the case of a termination described in section 2612(a) with respect to a trust, the portion of such termination that is subject to chapter 13 is the product of the allocation fraction and the value of the trust (to the extent of the terminated interest therein). In the case of a distribution described in section 2612(b) from a trust, the portion of such distribution that is subject to chapter 13 is the product of the allocation fraction and the value of the property distributed.

(C) *Allocation fraction*—(*1*) *In general*. The allocation fraction allocates appreciation and accumulated income between the chapter 13 and non-chapter 13 portions of a trust. The numerator of the allocation fraction is the amount of the addition (valued as of the date the addition is made), determined without regard to whether any part of the transfer is subject to tax under chapter 11 or chapter 12, but reduced by the amount of any Federal or state estate or gift tax imposed and subsequently paid by the recipient trust with respect to the addition. The denominator of the allocation fraction is the total value of the entire trust immediately after the addition. For purposes of this paragraph (b)(1)(iv)(C), the total value of the entire trust is the fair market value of the property held in trust (determined under the rules of section 2031), reduced by any amount attributable to or paid by the trust and attributable to the transfer to the trust that is similar to an amount that would be allowable as a deduction under section 2053 if the addition had occurred at the death of the transferor, and further reduced by the same amount that the numerator was reduced to reflect Federal or state estate or gift tax incurred by and subsequently paid by the recipient trust with respect to the addition. Where there is more than one addition to principal after September 25, 1985, the portion of the trust subject to chapter 13 after each such addition is determined pursuant to a revised fraction. In each case, the numerator of the revised fraction is the sum of the value of the chapter 13 portion of the trust immediately before the latest addition, and the amount of the latest addition. The denominator of the revised fraction is the total value of the entire trust immediately after the addition. If the transfer to the trust is a generation-skipping transfer, the numerator and denominator are reduced by the amount of the generation-skipping transfer tax, if any, that is imposed by chapter 13 on the transfer and actually recovered from the trust. The allocation fraction is rounded off to five decimal places (.00001).

(*2*) *Examples*. The following examples illustrate the application of paragraph (b)(1)(iv) of this section. In each of the examples, assume that the recipient trust does not pay any Federal or state transfer tax by reason of the addition.

Example 1. Post September 25, 1985, addition to trust. (i) On August 16, 1980, T established an irrevocable trust. Under the trust instrument, the trustee is required to distribute the entire income annually to T's child, C, for life, then to T's grandchild, GC, for life. Upon GC's death, the remainder is to be paid to GC's issue. On October 1, 1986, when the total value of the entire trust is $400,000, T transfers $100,000 to the trust. The allocation fraction is computed as follows:

$$\frac{\text{Value of addition}}{\text{Total value of trust}} = \frac{\$100,000}{\$400,000 + \$100,000} = .2$$

(ii) Thus, immediately after the transfer, 20 percent of the value of future generation-skipping transfers under the trust will be subject to chapter 13.

Example 2. Effect of expenses. Assume the same facts as in *Example 1,* except immediately prior to the transfer on October 1, 1986, the fair market value of the individual assets in the trust totaled $400,000. Also, assume that the trust had accrued and unpaid debts, expenses, and taxes totaling $300,000. Assume further that the entire $300,000 represented amounts that would be deductible under section 2053 if the trust were includible in the transferor's gross estate. The numerator of the allocation fraction is $100,000 and the denominator of the allocation fraction is $200,000 (($400,000 – $300,000) + $100,000). Thus, the allocation fraction is .5 ($100,000/$200,000) and 50 percent of the value of future generation-skipping transfers will be subject to chapter 13.

Example 3. Multiple additions. (i) Assume the same facts as in *Example 1,* except on January 30, 1988, when the total value of the entire trust is $600,000, T transfers an additional $40,000 to the trust. Before the transfer, the value of the portion of the trust that was attributable to the prior addition was $120,000 ($600,000 × .2). The new allocation fraction is computed as follows:

$$\frac{\text{Total value of additions}}{\text{Total value of trust}} =$$

$$\frac{\$120,000 + \$40,000}{\$600,000 + \$40,000} = \frac{\$160,000}{\$640,000} = .25$$

(ii) Thus, immediately after the transfer, 25 percent of the value of future generation-skipping transfers under the trust will be subject to chapter 13.

Example 4. Allocation fraction at time of generation-skipping transfer. Assume the same facts as in *Example 3,* except on March 1, 1989, when the value of the trust is $800,000, C dies. A generation-skipping transfer occurs at C's death because of the termination of C's life estate. Therefore, $200,000 ($800,000 × .25) is subject to tax under chapter 13.

(v) *Constructive additions*—(A) *Powers of Appointment.* Except as provided in paragraph (b)(1)(v)(B) of this section, where any portion of a trust remains in the trust after the post-September 25, 1985, release, exercise, or lapse of a power of appointment over that portion of the trust, and the release, exercise, or lapse is treated to any extent as a taxable transfer under chapter 11 or chapter 12, the value of the entire portion of the trust subject to the power that was released, exercised, or lapsed is treated as if that portion had been withdrawn and immediately retransferred to the trust at the time of the release, exercise, or lapse. The creator of the power will be considered the transferor of the addition except to the extent that the release, exercise, or lapse of the power is treated as a taxable transfer under chapter 11 or chapter 12. See §26.2652–1 for rules for determining the identity of the transferor of property for purposes of chapter 13.

(B) *Special rule for certain powers of appointment.* The release, exercise, or lapse of a power of appointment (other than a general power of appointment as defined in §2041(b)) is not treated as an addition to a trust if—

(*1*) Such power of appointment was created in an irrevocable trust that is not subject to chapter 13 under paragraph (b)(1) of this section; and

(*2*) In the case of an exercise, the power of appointment is not exercised in a manner that may postpone or suspend the vesting, absolute ownership or power of alienation of an interest in property for a period, measured from the date of creation of the trust, extending beyond any life in being at the date of creation of the trust plus a period of 21 years plus, if necessary, a reasonable period of gestation (the perpetuities period). For purposes of this paragraph (b)(1)(v)(B)(*2*), the exercise of a power of appointment that validly postpones or suspends the vesting, absolute ownership or power of alienation of an interest in property for a term of years that will not exceed 90 years (measured from the date of creation of the trust) will not be considered an exercise that postpones or suspends vesting, absolute ownership or the power of alienation beyond the perpetuities period. If a power is exercised by creating another power, it is deemed to be exercised to whatever extent the second power may be exercised.

(C) *Constructive addition if liability is not paid out of trust principal.* Where a trust described in paragraph (b)(1) of this section is relieved of any liability properly payable out of the assets of such trust, the person or entity who actually satisfies the liability is considered to have made a constructive addition to the trust in an amount equal to the liability. The constructive addition occurs when the trust is relieved of liability (*e.g.,* when the right of recovery is no longer enforceable). But see §26.2652–1(a)(3) for rules involving the application of section 2207A in the case of an election under section 2652(a)(3).

(D) *Examples.* The following examples illustrate the application of this paragraph (b)(1)(v):

Example 1. Lapse of a power of appointment. On June 19, 1980, T established an irrevocable trust with a corpus of $500,000. The trust instrument provides that the trustee shall distribute the entire income from the trust annually to T's spouse, S, during S's life. At S's death, the remainder is to be distributed to T and S's grandchild, GC. T also gave S a general power of appointment over one-half of the trust assets. On December 21, 1989, when the value of the trust corpus is $1,500,000, S died without having exercised the general power of appointment. The value of one-half of the trust corpus, $750,000 ($1,500,000 × .5) is included in S's gross estate under section 2041(a) and is subject to tax under Chapter 11. Because the value of one-half of the trust corpus is subject to tax under Chapter 11 with respect to S's estate, S is treated as the transferor of that property for purposes of Chapter 13 (see section 2652(a)(1)(A)). For purposes of the generation-skipping transfer tax, the lapse of S's power of appointment is treated as if $750,000 ($1,500,000 × .5) had been distributed to S and then transferred back to the trust. Thus, S is considered to have added $750,000 ($1,500,000 × .5) to the trust at the date of S's death. Because this constructive addition occurred after September 25, 1985, 50 percent of the corpus of the trust became subject to Chapter 13 at S's death.

Example 2. Multiple actual additions. On June 19, 1980, T established an irrevocable trust with a principal of $500,000. The trust instrument provides that the trustee shall distribute the entire income from the trust annually to T's spouse, S, during S's life. At S's death, the remainder is to be distributed to GC, the grandchild of T and S. On October 1, 1985, when the trust assets were valued at $800,000, T added $200,000 to the trust. After the transfer on October 1, 1985, the allocation fraction was .2 ($200,000/$1,000,000). On December 21, 1989, when the value of the trust principal is $1,000,000, T adds $1,000,000 to the trust. After this addition, the new allocation fraction is 0.6 ($1,200,000/$2,000,000). The numerator of the fraction is the value of that portion of trust assets that were subject to chapter 13 immediately prior to the addition (by reason of the first addition), $200,000 (.2 × $1,000,000), plus the value of the second transfer, $1,000,000, which equals $1,200,000. The denominator of the fraction, $2,000,000, is the total value of the trust assets immediately after the second transfer. Thus, 60 percent of the principal of the trust becomes subject to chapter 13.

Example 3. Entire portion of trust subject to lapsed power is treated as an addition. On September 25, 1985, B possessed a general power of appointment over the assets of an irrevocable trust that had been created by T in 1980. Under the terms of the trust, B's power lapsed on July 20, 1987. For Federal gift tax purposes, B is treated as making a gift of ninety-five percent (100% – 5%) of the value of the principal (see section 2514). However, because the entire trust was subject to the power of appointment, 100 percent (that portion of the trust subject to the power) of the assets of the trust are treated as a constructive addition. Thus, the entire amount of all generation-skipping transfers occurring pursuant to the trust instrument after July 20, 1987, are subject to chapter 13.

Example 4. Exercise of power of appointment in favor of another trust. On March 1, 1985, T established an irrevocable trust as defined in paragraph (b)(1)(ii) of this section. Under the terms of the trust instrument, the trustee is required to distribute the entire income annually to T's child, C, for life, then to T's grandchild, GC, for life. GC has the power to appoint any or all of the trust assets to Trust 2 which is an irrevocable trust (as defined in paragraph (b)(1)(ii) of this section) that was established on August 1, 1985. The terms of Trust 2's governing instrument provide that the trustee shall pay income to T's great grandchild, GGC, for life. Upon GGC's death the remainder is to be paid to GGC's issue. GGC was alive on March 1, 1985, when Trust 1 was created. C died on April 1, 1986. On July 1, 1987, GC exercised the power of appointment. The exercise of GC's power does not subject future transfers from Trust 2 to tax under chapter 13 because the exercise of the power in favor of Trust 2 does not suspend the vesting, absolute ownership, or power of alienation of an interest in property for a period, measured from the date of creation of Trust 1, extending beyond the life of GGC (a beneficiary under Trust 2 who was in being at the date of creation of Trust 1) plus a period of 21 years. The result would be the same if Trust 2 had been created after the effective date of chapter 13.

Example 5. Exercise of power of appointment in favor of another trust. Assume the same facts as in *Example 3*, except that GGC was born on March 28, 1986. The valid exercise of GC's power in favor of Trust 2 causes the principal of Trust 1 to be subject to chapter 13, because GGC was not born until after the creation of Trust 1. Thus, such exercise may suspend the vesting, absolute ownership, or power of alienation of an interest in the trust principal for a period, measured from the date of creation of Trust 1, extending beyond the life of GGC (a beneficiary under Trust 2 who was not a life in being at the date of creation of Trust 1).

Example 6. Extension for the longer of two periods. Prior to the effective date of chapter 13, GP established an irrevocable trust under which the trust income was to be paid to GP's child, C, for life. C was given a testamentary power to appoint the remainder in further trust for the benefit of C's issue. In default of C's exercise of the power, the remainder was to pass to charity. C died on February 3, 1995, survived by a child who was alive when GP established the trust. C exercised the power in a manner that validly extends the trust in favor of C's issue until the later of May 15, 2064 (80 years from the date the trust was created), or the death of C's child plus 21 years. C's exercise of the power is a constructive addition to the trust because the exercise may extend the trust for a period longer than the permissible periods of either the life of C's child (a life in being at the creation of the trust) plus 21 years or a term not more than 90 years measured from the creation of the trust. On the other hand, if C's exercise of the power could extend the trust based only on the life of C's child plus 21 years or only for a term of 80 years from the creation of the trust (but not the later of the two periods) then the exercise of the power would not have been a constructive addition to the trust.

Example 7. Extension for the longer of two periods. The facts are the same as in *Example 6* except local law provides that the effect of C's exercise is to extend the term of the trust until May 15, 2064, whether or not C's child predeceases that date by more than 21 years. C's exercise is not a constructive addition to the trust because C exercised the power in a manner that cannot postpone or suspend vesting, absolute ownership, or power of alienation for a term of years that will exceed 90 years. The result would be the same if the effect of C's exercise is either to extend the term of the trust until 21 years after the death of C's child or to extend the term of the trust until the first to occur of May 15, 2064 or 21 years after the death of C's child.

(vi) *Appreciation and income.* Except to the extent that the provisions of paragraphs (b)(1)(iv) and (v) of this section allocate subsequent appreciation and accumulated income between the original trust and additions thereto, appreciation in the value of the trust and undistributed income added thereto are not considered an addition to the principal of a trust.

(2) *Transition rule for wills or revocable trusts executed before October 22, 1986*—(i) *In general.* The provisions of chapter 13 do not apply to any generation-skipping transfer under a will or revocable trust executed before October 22, 1986, provided that—

(A) The document in existence on October 21, 1986, is not amended at any time after October 21, 1986, in any respect which results in the creation of, or an increase in the amount of, a generation-skipping transfer;

(B) In the case of a revocable trust, no addition is made to the revocable trust after October 21, 1986, that results in the creation of, or an increase in the amount of, a generation-skipping transfer; and

(C) The decedent dies before January 1, 1987.

(ii) *Revocable trust defined.* For purposes of this section, the term *revocable trust* means any trust (as defined in section 2652(b)) except to the extent that, on October 22, 1986, the trust—

(A) Was an irrevocable trust described in paragraph (b)(1) of this section; or

(B) Would have been an irrevocable trust described in paragraph (b)(1) of this section had it not been created or become irrevocable after September 25, 1985, and before October 22, 1986.

(iii) *Will or revocable trust containing qualified terminable interest property.* The rules contained in paragraph (b)(1)(iii) of this section apply to any will or revocable trust within the scope of the transition rule of this paragraph (b)(2).

(iv) *Amendments to will or revocable trust.* For purposes of this paragraph (b)(2), an amendment to a will or a revocable trust in existence on October 21, 1986, is not considered to result in the creation of, or an increase in the amount of, a generation-skipping transfer where the amendment is—

(A) Basically administrative or clarifying in nature and only incidentally increases the amount transferred; or

(B) Designed to ensure that an existing bequest or transfer qualifies for the applicable marital or charitable deduction for estate, gift, or generation-skipping transfer tax purposes and only incidentally increases the amount transferred to a skip person or to a generation-skipping trust.

(v) *Creation of, or increase in the amount of, a GST.* In determining whether a particular amendment to a will or revocable trust creates, or increases the amount of, a generation-skipping transfer for purposes of this paragraph (b)(2), the effect of the instrument(s) in existence on October 21, 1986, is measured against the effect of the instrument(s) in existence on the date of death of the decedent or on the date of any prior generation-skipping transfer. If the effect of an amendment cannot be immediately determined, it is deemed to create, or increase the amount of, a generation-skipping transfer until a determination can be made.

(vi) *Additions to revocable trusts.* Any addition made after October 21, 1986, but before the death of the settlor, to a revocable trust subjects all subsequent generation-skipping transfers under the trust to the provisions of chapter 13. Any addition made to a revocable trust after the death of the settlor (if the settlor dies before January 1, 1987) is treated as an addition to an irrevocable trust. See paragraph (b)(1)(v) of this section for rules involving constructive additions to trusts. See paragraph (b)(1)(v)(B) of this section for rules providing that certain transfers to trusts are not treated as additions for purposes of this section.

(vii) *Examples*. The following examples illustrate the application of paragraph (b)(2)(iv) of this section:

(A) *Facts applicable to Examples 1 through 5*. In each of *Examples 1* through *5* assume that T executed a will prior to October 22, 1986, and that T dies on December 31, 1986.

Example 1. Administrative change. On November 1, 1986, T executes a codicil to T's will removing one of the co-executors named in the will. Although the codicil may have the effect of lowering administrative costs and thus increasing the amount transferred, it is considered administrative in nature and thus does not cause generation-skipping transfers under the will to be subject to chapter 13.

Example 2. Effect of amendment not immediately determinable. On November 1, 1986, T executes a codicil to T's will revoking a bequest of $100,000 to C, a non-skip person (as defined under section 2613(b)) and causing that amount to be added to a residuary trust held for a skip person. The amendment is deemed to increase the amount of a generation-skipping transfer and prevents any transfers under the will from qualifying under paragraph (b)(2)(i) of this section. If, however, C dies before T and under local law the property would have been added to the residue in any event because the bequest would have lapsed, the codicil is not considered an amendment that increases the amount of a generation-skipping transfer.

Example 3. Refund of tax paid because of amendment. T's will provided that an amount equal to the maximum allowable marital deduction would pass to T's spouse with the residue of the estate passing to a trust established for the benefit of skip persons. On October 23, 1986, the will is amended to provide that the marital share passing to T's spouse shall be the lesser of the maximum allowable marital deduction or the minimum amount that will result in no estate tax liability for T's estate. The amendment may increase the amount of a generation-skipping transfer. Therefore, any generation-skipping transfers under the will are subject to tax under chapter 13. If it becomes apparent that the amendment does not increase the amount of a generation-skipping transfer, a claim for refund may be filed with respect to any generation-skipping transfer tax that was paid within the period set forth in section 6511. For example, it would become apparent that the amendment did not result in an increase in the residue if it is subsequently determined that the maximum marital deduction and the minimum amount that will result in no estate tax liability are equal in amount.

Example 4. An amendment that increases a generation-skipping transfer causes complete loss of exempt status. T's will provided for the creation of two trusts for the benefit of skip persons. On November 1, 1986, T executed a codicil to the will specifically increasing the amount of a generation-skipping transfer under the will. All transfers made pursuant to the will or either of the trusts created thereunder are precluded from qualifying under the transition rule of paragraph (b)(2)(i) of this section and are subject to tax under chapter 13.

Example 5. Corrective action effective. Assume that T in *Example 4* later executes a second codicil deleting the increase to the generation-skipping transfer. Because the provision increasing a generation-skipping transfer does not become effective, it is not considered an amendment to a will in existence on October 22, 1986.

(B) *Facts applicable to Examples 6 through 9*. T created a trust on September 30, 1985, in which T retained the power to revoke the transfer at any time prior to T's death. The trust provided that, upon the death of T, the income was to be paid to T's spouse, W, for life and then to A, B, and C, the children of T's sibling, S, in equal shares for life, with one-third of the principal to be distributed per stirpes to each child's surviving issue upon the death of the child. The trustee has the power to make discretionary distributions of trust principal to T's sibling, S.

Example 6. Amendment that affects only a person who is not a skip person. A became disabled, and T modified the trust on December 1, 1986, to increase A's share of the income. Since the amendment does not result in the creation of, or increase in the amount of, a generation-skipping transfer, transfers pursuant to the trust are not subject to chapter 13.

Example 7. Amendment increasing skip person's share. Assume that A, B, and C are the grandchildren of S rather than the children (and thus are skip persons as defined in section 2613). T's amendment of the trust increasing A's share of the income subjects the trust to the provisions of chapter 13 because the amendment increases the amount of the generation-skipping transfers to be made to A.

Example 8. Amendment that adds a skip person. Assume that T amends the trust to add T's grandchild, D, as an income beneficiary. The trust will be subject to the provisions of chapter 13 because the amendment creates a generation-skipping transfer.

Example 9. Refund of tax paid during interim period when effect of amendment is not determinable. Assume that T amends the trust to provide that the issue of S are to take a one-fourth share of the principal per stirpes upon S's death. Because the distribution to be made upon S's death may involve skip persons, the amendment is considered an amendment that creates or increases the amount of a generation-skipping transfer until a determination can be made. Accordingly, any distributions from (or terminations of interests in) such trust are subject to chapter 13 until it is determined that no skip person has been added to the trust. At that time, a claim for refund may be filed within the period set forth in section 6511 with respect to any generation-skipping transfer tax that was paid.

(3) *Transition rule in the case of mental incompetency*—(i) *In general*. If an individual was under a mental disability to change the disposition of his or her property continuously from October 22, 1986, until the date of his or her death, the provisions of chapter 13 do not apply to any generation-skipping transfer—

(A) Under a trust (as defined in section 2652(b)) to the extent such trust consists of property, or the proceeds of property, the value of which was included in the gross estate of the individual (other than property transferred by or on behalf of the individual during the individual's life after October 22, 1986); or

(B) Which is a direct skip (other than a direct skip from a trust) that occurs by reason of the death of the individual.

(ii) *Mental disability defined*. For purposes of this paragraph (b)(2), the term *mental disability* means mental incompetence to execute an instrument governing the disposition of the individual's property, whether or not there was an adjudication of incompetence and regardless of whether there has been an appointment of a guardian, fiduciary, or other person charged with either the care of the individual or the care of the individual's property.

(iii) *Decedent who has not been adjudged mentally incompetent*. If there has not been a court adjudication that the decedent was mentally incompetent on or before October 22, 1986, the executor must file, with Form 706, either—

(A) A certification from a qualified physician stating that the decedent was—

(*1*) mentally incompetent at all times on and after October 22, 1986; and

(*2*) did not regain competence to modify or revoke the terms of the trust or will prior to his or her death; or

(B) Sufficient other evidence demonstrating that the decedent was mentally incompetent at all times on and after October 22, 1986, as well as a statement explaining why no certification is available from a physician; and

(C) Any judgement or decree relating to the decedent's incompetency that was made after October 22, 1986.

Such items will be considered relevant, but not determinative, in establishing the decedent's state of competency.

(iv) *Decedent who has been adjudged mentally incompetent*. If the decedent has been adjudged mentally incompetent on or before October 22, 1986, a copy of the judgment or decree, and any modification thereof, must be filed with the Form 706.

(v) *Rule applies even if another person has power to change trust terms*. In the case of a transfer from a trust, this paragraph (b)(3) applies even though a person charged with the care of the decedent or the decedent's property has the power to revoke or modify the terms of the trust, provided that the power is not exercised after October 22, 1986, in a manner that creates, or increases the amount of, a generation-skipping transfer. See paragraph (b)(2)(iv) of this section for rules concerning amendments that create or increase the amount of a generation-skipping transfer.

(vi) *Example*. The following example illustrates the application of paragraph (b)(3)(v) of this section:

Example. T was mentally incompetent on October 22, 1986, and remained so until death in 1993. Prior to becoming incompetent, T created a revocable generation-skipping trust that was includible in T's gross estate. Prior to October 22, 1986, the appropriate court issued an order under which P, who was thereby charged with the care of T's property, had the power to modify or revoke the revocable trust. Although P exercised the power after October 22, 1986, and while T was incompetent, the power was not exercised in a manner that created, or increased the amount of, a generation-skipping transfer. Thus, the existence and exercise of P's power did not cause the trust to lose its exempt status under paragraph (b)(3) of this section. The result would be the same if the court order was issued after October 22, 1986.

(4) *Exceptions to additions rule*—(i) *In general*. Any addition to a trust made pursuant to an instrument or arrangement covered by the transition rules in paragraph (b)(2) or (3) of this section is not treated as an addition for purposes of this section. Moreover, any property transferred inter vivos to a trust is not treated as an addition if the same property would have been added to the trust pursuant to an instrument covered by the transition rules in paragraph (b)(2) or (3) of this section.

(ii) *Examples*. The following examples illustrate the application of paragraph (b)(4)(i) of this section:

Example 1. Addition pursuant to terms of exempt instrument. On December 31, 1980, T created an irrevocable trust having a principal of $100,000. Under the terms of the trust, the principal was to be held for the benefit of T's grandchild, GC. Pursuant to the terms of T's will, a document entitled to relief under the transition rule of paragraph (b)(2) of this section, the residue of the estate was paid to the trust. Because the addition to the trust was paid pursuant to the terms of an instrument (T's will) that is not subject to the provisions of chapter 13 because of paragraph (b)(2) of this section, the payment to the trust is not considered an addition to the principal of the trust. Thus, distributions to or for the benefit of GC, are not subject to the provisions of chapter 13.

Example 2. Property transferred inter vivos that would have been transferred to the same trust by the transferor's will. T is the grantor of a trust that was irrevocable on September 25, 1985. T's will, which was executed before October 22, 1986, and not amended thereafter, provides that, upon T's death, the entire estate will pour over into T's trust. On October 1, 1985, T transfers $100,000 to the trust. While T's will otherwise qualifies for relief under the transition rule in paragraph (b)(2) of this section, the transition rule is not applicable unless T dies prior to January 1, 1987. Thus, if T dies after December 31, 1986, the transfer is treated as an addition to the trust for purposes of any distribution made from the trust after the transfer to the trust on October 1, 1985. If T dies before January 1, 1987, the entire trust (as well as any distributions from or terminations of interests in the trust prior to T's death) is exempt, under paragraph (b)(2) of this section, from chapter 13 because the $100,000 would have been added to the trust under a will that would have qualified under paragraph (b)(2) of this section. In either case, for any generation-skipping transfers made after the transfer to the trust on October 1, 1985, but before T's death, the $100,000 is treated as an addition to the trust and a proportionate amount of the trust is subject to chapter 13.

Example 3. Pour over to a revocable trust. T and S are the settlors of separate revocable trusts with equal values. Both trusts were established for the benefit of skip persons (as defined in section 2613). S dies on December 1, 1985, and under the provisions of S's trust, the principal pours over into T's trust. If T dies before January 1, 1987, the entire trust is excluded under paragraph (b)(2) of this section from the operation of chapter 13. If T dies after December 31, 1986, the entire trust is subject to the generation-skipping transfer tax provisions because T's trust is not a trust described in paragraph (b)(1) or (2) of this section. In the latter case, the fact that S died before January 1, 1987, is irrelevant because the principal of S's trust was added to a trust that never qualified under the transition rules of paragraph (b)(1) or (2) of this section.

Example 4. Pour over to exempt trust. Assume the same facts as in *Example 3*, except upon the death of S on December 1, 1985, S's trust continues as an irrevocable trust and that the principal of T's trust is to be paid over upon T's death to S's trust. Again, if T dies before January 1, 1987, S's entire trust falls within the provisions of paragraph (b)(2) of this section. However, if T dies after December 31, 1986, the pour-over is considered an addition to the trust. Therefore, S's trust is not a trust excluded under paragraph (b)(2) of this section because an addition is made to the trust.

Example 5. Lapse of a general power of appointment. S, the spouse of the settlor of an irrevocable trust that was created in 1980, had, on September 25, 1985, a general power of appointment over the trust assets. The trust provides that should S fail to exercise the power of appointment the property is to remain in the trust. On October 21, 1986, S executed a will under which S failed to exercise the power of appointment. If S dies before January 1, 1987, without having exercised the power in a manner which results in the creation of, or increase in the amount of, a generation-skipping transfer (or amended the will in a manner that results in the creation of, or increase in the amount of, a generation-skipping transfer), transfers pursuant to the trust or the will are not subject to chapter 13 because the trust is an irrevocable trust and the will qualifies under paragraph (b)(2) of this section.

Example 6. Lapse of general power of appointment held by intestate decedent. Assume the same facts as in *Example 5*, except on October 22, 1986, S did not have a will and that S dies after that date. Upon S's death, or upon the prior exercise or release of the power, the value of the entire trust is treated as having been distributed to S, and S is treated as having made an addition to the trust in the amount of the entire principal. Any distribution or termination pursuant to the trust occurring after S's death is subject to chapter 13. It is immaterial whether S's death occurs before January 1, 1987, since paragraph (b)(2) of this section is only applicable where a will or revocable trust was executed before October 22, 1986.

(c) *Additional effective dates*. Except as otherwise provided, the regulations under §§26.2611–1, 26.2612–1, 26.2613–1, 26.2632–1, 26.2641–1, 26.2642–1, 26.2642–2, 26.2642–3, 26.2642–4, 26.2642–5, 26.2652–1, 26.2652–2, 26.2653–1, 26.2654–1, 26.2663–1, and 26.2663–2 are effective with respect to generation-skipping transfers as defined in §26.2611–1 made on or after December 27, 1995. However, taxpayers may, at their option, rely on these regulations in the case of generation-skipping transfers made, and trusts that became irrevocable, after December 23, 1992, and before December 27, 1995.

§26.2611–1 Generation-skipping transfer defined.

A generation-skipping transfer (GST) is an event that is either a direct skip, a taxable distribution, or a taxable termination. See §26.2612–1 for the definition of these terms. The determination as to whether an event is a GST is made by reference to the most recent transfer subject to the estate or gift tax. See §26.2652–1(a)(2) for determining whether a transfer is subject to Federal estate or gift tax.

§26.2612–1 Definitions.

(a) *Direct skip*—(1) *In general*. A direct skip is a transfer to a skip person that is subject to Federal estate or gift tax. If property is transferred to a trust, the transfer is a direct skip only if the trust is a skip person. Only one direct skip occurs when a single transfer of property skips two or more generations. See paragraph (d) of this section for the definition of skip person. See §26.2652–1(b) for the definition of trust. See §26.2632–1(c)(4) for the time that a direct skip occurs if the transferred property is subject to an estate tax inclusion period.

(2) *Special rule for certain lineal descendants*—(i) *In general*. Solely for the purpose of determining whether a transfer to or for the benefit of a lineal descendant of the transferor, the transferor's spouse, or a former spouse of the transferor is a direct skip, the generation assignment of the descendant is determined by disregarding the generation of a predeceased individual who was both an ancestor of the descendant and a lineal descendant of the transferor, the transferor's spouse, or a former spouse of the transferor (a predeceased child). If a transfer to a trust would be a direct skip but for this paragraph, any generation assignment determined under this paragraph continues to apply in determining whether any subsequent distribution from (or termination of an interest in) the portion of the trust attributable to that transfer is a GST. A living descendant who dies no later than 90 days after the subject transfer is treated as having predeceased the transferor to the extent that either the governing instrument or applicable local law provides that such individual shall be treated as predeceasing the transferor. Except as provided in this paragraph (a)(2), a living descendant is not treated as a predeceased child solely by reason of applicable local law; *e.g.*, an individual is not treated as a predeceased child solely because state law treats an individual executing a disclaimer as having predeceased the transferor of the disclaimed property. See §26.2652–1(a)(1) for the definition of *transferor*. See paragraph (e) of this section for the definition of *interest in trust*.

(ii) *Special rule*. If a transferor makes an addition to an existing trust after the death of an individual described in paragraph (a)(2)(i) of this section (so that the transferor would be assigned to a lower generation by reason of that death), the additional property is treated as being held in a separate trust for purposes of chapter 13 and the provisions of §26.2654–1(a)(2) apply as if the portions of the single trust had separate transferors. Subsequent additions are treated as additions to the appropriate portion of the single trust.

(b) *Taxable termination*—(1) *In general*. Except as otherwise provided in this paragraph (b), a taxable termination is a termination (occurring for any reason) of an interest in trust unless—

(i) A transfer subject to Federal estate or gift tax occurs with respect to the property held in the trust at the time of the termination (*i.e.*, a new transferor is determined with respect to the property);

(ii) Immediately after the termination, a person who is not a skip person has an interest in the trust; or

(iii) At no time after the termination may a distribution, other than a distribution the probability of which occurring is so remote as to be negligible (including a distribution at the termination of the trust) be made from the trust to a skip person. For this purpose, the probability that a distribution will occur is so remote as to be negligible only if it can be ascertained by actuarial standards that there is less than a 5 percent probability that the distribution will occur.

(2) *Partial termination*. If a distribution of a portion of trust property is made to a skip person by reason of a termination occurring on the death of a lineal descendant of the transferor, the termination is a taxable termination with respect to the distributed property.

(3) *Simultaneous terminations*. A simultaneous termination of two or more interests creates only one taxable termination.

(c) *Taxable distribution*—(1) *In general*. A taxable distribution is a distribution of income or principal from a trust to a skip person unless the distribution is a taxable termination or a direct skip. If any portion of GST tax (including penalties and interest thereon) imposed on a distributee is paid from the distributing trust, the payment is an additional taxable distribution to the distributee. For purposes of chapter 13, the additional distribution is treated as having been made on the last day of the calendar year in which the original taxable distribution is made. If Federal estate or gift tax is imposed on any individual with respect to an interest in property held by a trust, the interest in property is treated as having been distributed to the individual to the extent that the value of the interest is subject to Federal estate or gift tax. See §26.2652–1(a)(6) *Example 5*, regarding the treatment of the lapse of a power of appointment as a transfer to a trust.

(2) *Look-through rule not to apply*. Solely for purposes of determining whether any transfer from a trust to another trust is a taxable distribution, the rules of section 2651(e)(2) do not apply. If the transferring trust and the recipient trust have the same transferor, see §26.2642–4(a)(1) and (2) for rules for recomputing the applicable fraction of the recipient trust.

(d) *Skip person*. A skip person is—

(1) An individual assigned to a generation more than one generation below that of the transferor (determined under the rules of section 2651); or

(2) A trust if—

(i) All interests in the trust are held by skip persons; or

(ii) No person holds an interest in the trust and no distributions, other than a distribution the probability of which occurring is so remote as to be negligible (including distributions at the termination of the trust), may be made after the transfer to a person other than a skip person. For this purpose, the probability that a distribution will occur is so remote as to be negligible only if it can be ascertained by actuarial standards that there is less than a 5 percent probability that the distribution will occur.

(e) *Interest in trust*—(1) *In general*. An interest in trust is an interest in property held in trust as defined in section 2652(c) and these regulations. An interest in trust exists if a person—

(i) Has a present right to receive trust principal or income;

(ii) Is a permissible current recipient of trust principal or income and is not described in section 2055(a); or

(iii) Is described in section 2055(a) and the trust is a charitable remainder annuity trust or unitrust (as defined in section 664(d)) or a pooled income fund (as defined in section 642(c)(5)).

(2) *Exceptions*—(i) *Support obligations*. In general, an individual has a present right to receive trust income or principal if trust income or principal may be used to satisfy the individual's support obligations. However, an individual does not have an interest in a trust merely because a support obligation of that individual may be satisfied by a distribution that is either within the discretion of a fiduciary or pursuant to provisions of local law substantially equivalent to the Uniform Gifts (Transfers) to Minors Act.

(ii) *Certain interests disregarded*. An interest which is used primarily to postpone or avoid the GST tax is disregarded for purposes of chapter 13. An interest is considered as used primarily to postpone or avoid the GST tax if a significant purpose for the creation of the interest is to postpone or avoid the tax.

(3) *Disclaimers*. An interest does not exist to the extent it is disclaimed pursuant to a disclaimer that constitutes a qualified disclaimer under section 2518.

(f) *Examples*. The following examples illustrate the provisions of this section. Unless stated otherwise, paragraph (a)(2) of this section, which assigns descendants to a higher generation when there is a predeceased ancestor, does not apply.

Example 1. Direct skip. T gratuitously conveys Blackacre to T's grandchild. Because the transfer is a transfer to a skip person of property subject to Federal gift tax, it is a direct skip.

Example 2. Direct skip of more than one generation. T gratuitously conveys Blackacre to T's great-grandchild. The transfer is a direct skip. Only one GST tax is imposed on the direct skip although two generations are skipped by the transfer.

Example 3. Withdrawal power in trust. T transfers $50,000 to a new trust providing that trust income is to be paid to T's child, C, for life and, on C's death, the trust principal is to be paid to T's descendants. Under the terms of the trust, T grants four grandchildren the right to withdraw $10,000 from the trust for a 60 day period following the transfer. Since C, who is not a skip person, has an interest in the trust, the trust is not a skip person. T's transfer to the trust is not a direct skip.

Example 4. Taxable termination. T establishes an irrevocable trust under which the income is to be paid to T's child, C, for life. On the death of C, the trust principal is to be paid to T's grandchild, GC. Since C has an interest in the trust, the trust is not a skip person and the transfer to the trust is not a direct skip. If C dies survived by GC, a taxable termination occurs at C's death because C's interest in the trust terminates and thereafter the trust property is held by a skip person who occupies a lower generation than C.

Example 5. Direct skip of property held in trust. T establishes a testamentary trust under which the income is to be paid to T's surviving spouse, S, for life and the remainder is to be paid to a grandchild of T and S. T's executor elects to treat the trust as qualified terminable interest property under section 2056(b)(7). The transfer to the trust is not a direct skip because S, a person who is not a skip person, holds a present right to receive income from the trust. Upon S's death, the trust property is included in S's gross estate under section 2044 and passes directly to a skip person. The GST occurring at that time is a direct skip because it is a transfer subject to chapter 11. The fact that the interest created by T is terminated at S's death is immaterial because S becomes the transferor at the time of the transfer subject to chapter 11.

Example 6. Predeceased ancestor exception. T establishes an irrevocable trust providing that trust income is to be paid to T's grandchild, GC, for 5 years. At the end of the 5-year period, the trust is to terminate and the principal is to be distributed to GC. T's child, C, a parent of GC, is deceased at the time T establishes the trust. Therefore, GC is treated as a child of T rather than as a grandchild. As a result, GC is not a skip person, and the initial transfer to the trust is not a direct skip. Similarly, distributions to GC during the term of the trust and at the termination of the trust will not be GSTs.

Example 7. Predeceased ancestor exception not applicable. The facts are the same as in *Example 6*, except the trust income is to be paid to T's spouse, S, during the first two years of the trust. Since S has an interest in the trust, the trust is not a skip person and the transfer by T is not a direct skip. Since the transfer is not a direct skip, the predeceased ancestor rule does not apply and GC is not treated as the child of T. A taxable termination occurs at the expiration of S's interest.

Example 8. Taxable termination. T establishes an irrevocable trust for the benefit of T's child, C, T's grandchild, GC, and T's great-grandchild, GGC. Under the terms of the trust, income and principal may be distributed to any or all of the living beneficiaries at the discretion of the trustee. Upon the death of the second beneficiary to die, the trust principal is to be paid to the survivor. C dies first. A taxable termination occurs at that time because, immediately after C's interest terminates, all interests in the trust are held by skip persons (GC and GGC).

Example 9. Taxable termination resulting from distribution. The facts are the same as in *Example 8*, except twenty years after C's death the trustee exercises its discretionary power and distributes the entire principal to GGC. The distribution results in a taxable termination because GC's interest in the trust terminates as a result of the distribution of the entire trust property to GGC, a skip person. The result would be the same if the trustee retained sufficient funds to pay the GST tax due by reason of the taxable termination, as well as any expenses of winding up the trust.

Example 10. Simultaneous termination of interests of more than one beneficiary. T establishes an irrevocable trust for the benefit of T's child, C, T's grandchild, GC, and T's great-grandchild, GGC. Under the terms of the trust, income and principal may be distributed to any or all of the living beneficiaries at the discretion of the trustee. Upon the death of C, the trust property is to be distributed to GGC if then living. If C is survived by both GC and GGC, both C's and GC's interests in the trust will terminate on C's death. However, because both interests will terminate at the same time and as a result of one event, only one taxable termination occurs.

Example 11. Partial taxable termination. T creates an irrevocable trust providing that trust income is to be paid to T's children, A and B, in such proportions as the trustee determines for their joint lives. On the death of the first child to die, one-half of the trust principal is to be paid to T's then living grandchildren. The balance of the trust principal is to be paid to T's grandchildren on the death of the survivor of A and B. If A predeceases B, the distribution occurring on the termination of A's interest in the trust is a taxable termination and not a taxable distribution. It is a taxable termination because the distribution is a distribution of a portion of the trust that occurs as a result of the death of A, a lineal descendant of T. It is immaterial that a portion of the trust continues and that B, a person other than a skip person, thereafter holds an interest in the trust.

Example 12. Taxable distribution. T establishes an irrevocable trust under which the trust income is payable to T's child, C, for life. When T's grandchild, GC, attains 35 years of age, GC is to receive one-half of the principal. The remaining one-half of the principal is to be distributed to GC on C's death. Assume that C survives until GC attains age 35. When the trustee distributes one-half of the principal to GC on GC's 35th birthday, the distribution is a taxable distribution because it is a distribution to a skip person and is neither a taxable termination nor a direct skip.

Example 13. Exercise of withdrawal right as taxable distribution. The facts are the same as in *Example 12*, except GC holds a continuing right to withdraw trust principal and after one year GC withdraws $10,000. The withdrawal by GC is not a taxable termination because the withdrawal does not terminate C's interest in the trust. The withdrawal by GC is a taxable distribution to GC.

Example 14. Interest in trust. T establishes an irrevocable trust under which the income is to be paid to T's child, C, for life. On the death of C, the trust principal is to be paid to T's grandchild, GC. Because C has a present right to receive income from the trust, C has an interest in the trust. Because GC cannot currently receive distributions from the trust, GC does not have an interest in the trust.

Example 15. Support obligation. T establishes an irrevocable trust for the benefit of T's grandchild, GC. The trustee has discretion to distribute property for GC's support without regard to the duty or ability of GC's parent, C, to support GC. Because GC is a permissible current recipient of trust property, GC has an interest in the trust. C does not have an interest in the trust because the potential use of the trust property to satisfy C's support obligation is within the discretion of a fiduciary. C would be treated as having an interest in the trust if the trustee was required to distribute trust property for GC's support.

§26.2613–1 Skip person.

For the definition of *skip person* see §26.2612–1(d).

§26.2632–1 Allocation of GST exemption.

(a) *General rule*. Except as otherwise provided in this section, an individual or the individual's executor may allocate the individual's $1 million GST exemption at any time from the date of the transfer through the date for filing the individual's Federal estate tax return (including any extensions for filing that have been actually granted). If no estate tax return is required to be filed, the GST exemption may be allocated at any time through the date a Federal estate tax return would be due if a return were required to be filed (including any extensions actually granted). If property is held in trust, the allocation of GST exemption is made to the entire trust rather than to specific trust assets. If a transfer is a direct skip to a trust, the allocation of GST exemption to the transferred property is also treated as an allocation of GST exemption to the trust for purposes of future GSTs with respect to the trust by the same transferor.

(b) *Lifetime allocations*—(1) *Automatic allocation to direct skips*—(i) *In general*. If a direct skip occurs during the transferor's lifetime, the transferor's GST exemption not previously allocated (unused GST exemption) is automatically allocated to the transferred property (but not in excess of the fair market value of the property on the date of the transfer). The transferor may prevent the automatic allocation of GST exemption by describing on a timely-filed United States Gift (and Generation-Skipping Transfer) Tax Return (Form 709) the transfer and the extent to which the automatic allocation is not to apply. In addition, a timely-filed Form 709 accompanied by payment of the GST tax (as shown on the return with respect to the direct skip) is sufficient to prevent an automatic allocation of GST exemption with respect to the transferred property. See paragraph (c)(4) of this section for special rules in the case of direct skips treated as occurring at the termination of an estate tax inclusion period.

(ii) *Time for filing Form 709*. A Form 709 is timely filed if it is filed on or before the date required for reporting the transfer if it were a taxable gift (*i.e.*, the date prescribed by section 6075(b), including any extensions to file actually granted (the due date)). Except as provided in paragraph (b)(1)(iii) of this section, the automatic allocation of GST exemption (or the election to prevent the allocation, if made) is irrevocable after the due date. An automatic allocation of GST exemption is effective as of the date of the transfer to which it relates. Except as provided above, a Form 709 need not be filed to report an automatic allocation.

(iii) *Transitional rule*. An election to prevent an automatic allocation of GST exemption filed on or before January 26, 1996, becomes irrevocable on July 24, 1996.

(2) *Allocation to other transfers*—(i) *In general*. An allocation of GST exemption to property transferred during the transferor's lifetime, other than in a direct skip, is made on Form 709. The allocation must clearly identify the trust to which the allocation is being made, the amount of GST exemption allocated to it, and if the allocation is late or if an inclusion ratio greater than zero is claimed, the value of the trust assets at the effective date of the allocation. See paragraph (b)(2)(ii) of this section. The allocation should also state the inclusion ratio of the trust after the allocation. Except as otherwise provided in this paragraph, an allocation of GST exemption may be made by a formula; *e.g.*, the allocation may be expressed in terms of the amount necessary to produce an inclusion ratio of zero. However, formula allocations made with respect to charitable lead annuity trusts are not valid except to the extent they are dependent on values as finally determined for Federal estate or gift tax purposes. With respect to a timely allocation, an allocation of GST exemption becomes irrevocable after the due date of the return. Except as provided in §26.2642–3 (relating to charitable lead annuity trusts), an allocation of GST exemption to a trust is void to the extent the amount allocated exceeds the amount necessary to obtain an inclusion ratio of zero with respect to the trust. See §26.2642–1 for the definition of inclusion ratio. An allocation is also void if the allocation is made with respect to a trust that has no GST potential with respect to the transferor making the allocation, at the time of the allocation. For this purpose, a trust has GST potential even if the possibility of a GST is so remote as to be negligible.

(ii) *Effective date of allocation*—(A) *In general*. (*1*) Except as otherwise provided, an allocation of GST exemption is effective as of the date of any transfer as to which the Form 709 on which it is made is a timely filed return (a timely allocation). If more than one timely allocation is made, the earlier allocation is modified only if the later allocation clearly identifies the transfer and the nature and extent of the modification. Except as provided in paragraph (d)(1) of this section, an allocation to a trust made on a Form 709 filed after the due date for reporting a transfer to the trust (a late allocation) is effective on the date the Form 709 is filed and is deemed to precede in point of time any taxable event occurring on such date. For purposes of this paragraph (b)(2)(ii), the Form 709 is deemed filed on the date it is postmarked to the Internal Revenue Service Center. See §26.2642–2 regarding the effect of a late allocation in determining the inclusion ratio, etc. See paragraph (c)(1) of this section regarding allocation of GST exemption to property subject to an estate tax inclusion period. If it is unclear whether an allocation of GST exemption on a Form 709 is a late or a timely allocation to a trust, the allocation is effective in the following order—

(*i*) To any transfer to the trust disclosed on the return as to which the return is a timely return;

(*ii*) As a late allocation; and

(*iii*) To any transfer to the trust not disclosed on the return as to which the return would be a timely return.

(*2*) A late allocation to a trust may be made on a Form 709 that is timely filed with respect to another transfer. A late allocation is irrevocable when made.

(B) *Amount of allocation*. If other transfers exist with respect to which GST exemption could be allocated under paragraphs (b)(2)(ii)(A)(*1*)(*ii*) and (*iii*), any GST exemption allocated under paragraph (b)(2)(ii)(A)(*1*)(*i*) of this section is allocated in an amount equal to the value of the transferred property as reported on the Form 709. Thus, if the GST exemption allocated on the Form 709 exceeds the value of the transfers reported on that return that have generation-skipping potential, the initial allocation under paragraph (b)(2)(ii)(A)(*1*)(*i*) of this section is in the amount of the value of those transfers as reported on that return. Any remaining amount of GST exemption allocated on that return is then allocated pursuant to paragraphs (b)(2)(ii)(A)(*1*)(*ii*) and (*iii*) of this section, notwithstanding any subsequent upward adjustment in value of the transfers reported on the return.

(iii) *Examples*. The following examples illustrate the provisions of this paragraph (b):

Example 1. Modification of allocation of GST exemption. T transfers $100,000 to an irrevocable generation-skipping trust on December 1, 1996. The transfer to the trust is not a direct skip. The date prescribed for filing the gift tax return reporting the taxable gift is April 15, 1997. On February 10, 1997, T files a Form 709 allocating $50,000 of GST exemption to the trust. On April

10 of the same year, T files an amended Form 709 allocating $100,000 of GST exemption to the trust in a manner that clearly indicates the intention to modify and supersede the prior allocation with respect to the 1996 transfer. The allocation made on the April 10 return supersedes the prior allocation because it is made on a timely-filed Form 709 that clearly identifies the trust and the nature and extent of the modification of GST exemption allocation. The allocation of $100,000 of GST exemption to the trust is effective as of December 1, 1996. The result would be the same if the amended Form 709 decreased the amount of the GST exemption allocated to the trust.

Example 2. Modification of allocation of GST exemption. The facts are the same as in *Example 1*, except on July 10, 1997, T files a Form 709 attempting to reduce the earlier allocation. The return is not a timely-filed return. The $100,000 GST exemption allocated to the trust, as amended on April 10, 1997, remains in effect because an allocation, once made, is irrevocable and may not be modified after the last date on which a timely-filed Form 709 can be filed.

Example 3. Effective date of late allocation of GST exemption. T transfers $100,000 to an irrevocable generation-skipping trust on December 1, 1996. The transfer to the trust is not a direct skip. The date prescribed for filing the gift tax return reporting the taxable gift is April 15, 1997. On December 1, 1997, T files a Form 709 and allocates $50,000 to the trust. The allocation is effective as of December 1, 1997.

Example 4. Effective date of late allocation of GST exemption. T transfers $100,000 to a generation-skipping trust on December 1, 1996, in a transfer that is not a direct skip. T does not make an allocation of GST exemption on a timely-filed Form 709. On July 1, 1997, the trustee makes a taxable distribution from the trust to T's grandchild in the amount of $30,000. Immediately prior to the distribution, the value of the trust assets was $150,000. On the same date, T allocates GST exemption to the trust in the amount of $50,000. The allocation of GST exemption on the date of the transfer is treated as preceding in point of time the taxable distribution. At the time of the GST, the trust has an inclusion ratio of .6667 (1 – (50,000/150,000)).

Example 5. Automatic allocation to split-gift direct skip. On May 15, 1996, T transfers $50,000 to a trust in a direct skip. T does not file a timely gift tax return electing out of the automatic allocation. On April 30, 1998, T and T's spouse, S, file an initial gift tax return for 1996 on which they consent, pursuant to section 2513, to have the gift treated as if one-half had been made by each. As a result of the election under section 2513, which is retroactive to the date of T's transfer, T and S are each treated as the transferor of one-half of the property transferred in the direct skip. Thus, $25,000 of T's unused GST exemption and $25,000 of S's unused GST exemption is automatically allocated to the trust. Both allocations are effective on and after the date that T made the transfer.

(c) *Special rules during an estate tax inclusion period*—(1) *In general*. An allocation of GST exemption (including an automatic allocation) to property subject to an estate tax inclusion period (ETIP) that is made prior to termination of the ETIP cannot be revoked, but becomes effective no earlier than the date of any termination of the ETIP with respect to the trust. Where an allocation has not been made prior to the termination of the ETIP, an allocation is effective at the termination of the ETIP during the transferor's lifetime if made by the due date for filing a Form 709 that would apply to a taxable gift occurring at the time the ETIP terminates (timely ETIP return). An allocation is effective in the case of the termination of the ETIP on the death of the transferor as provided in paragraph (d) of this section. If any part of a trust is subject to an ETIP, the entire trust is subject to the ETIP. See §26.2642–1(b)(2) for rules determining the inclusion ratio applicable in the case of GSTs during an ETIP.

(2) *Estate tax inclusion period defined*—(i) *In general*. An ETIP is the period during which, should death occur, the value of transferred property would be includible (other than by reason of section 2035) in the gross estate of—

(A) The transferor; or

(B) The spouse of the transferor.

(ii) *Exceptions*—(A) For purposes of paragraph (c)(2) of this section, the value of transferred property is not considered as being subject to inclusion in the gross estate of the transferor or the spouse of the transferor if the possibility that the property will be included is so remote as to be negligible. A possibility is so remote as to be negligible if it can be ascertained by actuarial standards that there is less than a 5 percent probability that the property will be included in the gross estate.

(B) For purposes of paragraph (c)(2) of this section, the value of transferred property is not considered as being subject to inclusion in the gross estate of the spouse of the transferor, if the spouse possesses with respect to any transfer to the trust, a right to withdraw no more than the greater of $5,000 or 5 percent of the trust corpus, and such withdrawal right terminates no later than 60 days after the transfer to the trust.

(C) The rules of this paragraph (c)(2) do not apply to qualified terminable interest property with respect to which the special election under §26.2652–2 has been made.

(3) *Termination of an ETIP*. An ETIP terminates on the first to occur of—

(i) The death of the transferor;

(ii) The time at which no portion of the property is includible in the transferor's gross estate (other than by reason of section 2035) or, in the case of an individual who is a transferor solely by reason of an election under section 2513, the time at which no portion would be includible in the gross estate of the individual's spouse (other than by reason of section 2035);

(iii) The time of a GST, but only with respect to the property involved in the GST; or

(iv) In the case of an ETIP arising by reason of an interest or power held by the transferor's spouse under subsection (c)(2)(i)(B) of this section, at the first to occur of—

(A) The death of the spouse; or

(B) The time at which no portion of the property would be includible in the spouse's gross estate (other than by reason of section 2035).

(4) *Treatment of direct skips*. If property transferred to a skip person is subject to an ETIP, the direct skip is treated as occurring on the termination of the ETIP.

(5) *Examples*. The following examples illustrate the rules of this section as they apply to the termination of an ETIP during the lifetime of the transferor. In each example assume that T transfers $100,000 to an irrevocable trust:

Example 1. Allocation of GST exemption during ETIP. The trust instrument provides that trust income is to be paid to T for 9 years or until T's prior death. The trust principal is to be paid to T's grandchild on the termination of T's income interest. If T dies within the 9-year period, the value of the trust principal is includible in T's gross estate under section 2036(a). Thus, the trust is subject to an ETIP. T files a timely Form 709 reporting the transfer and allocating $100,000 of GST exemption to the trust. The allocation of GST exemption to the trust is not effective until the termination of the ETIP.

Example 2. Effect of prior allocation on termination of ETIP. The facts are the same as in *Example 1*, except the trustee has the power to invade trust principal on behalf of T's grandchild, GC, during the term of T's income interest. In year 4, when the value of the trust is $200,000, the trustee distributes $15,000 to GC. The distribution is a taxable distribution. The ETIP with respect to the property distributed to GC terminates at the time of the taxable distribution. See paragraph (c)(3)(iii) of this section. Solely for purposes of determining the trust's inclusion ratio with respect to the taxable distribution, the prior $100,000 allocation of GST exemption (as well as any additional allocation made on a timely ETIP return) is effective immediately prior to the taxable distribution. See

§26.2642–1(b)(2). The trust's inclusion ratio with respect to the taxable distribution is therefore .50 (1–(100,000/200,000)).

Example 3. Split-gift transfers subject to ETIP. The trust instrument provides that trust income is to be paid to T for 9 years or until T's prior death. The trust principal is to be paid to T's grandchild on the termination of T's income interest. T files a timely Form 709 reporting the transfer. T's spouse, S, consents to have the gift treated as made one-half by S under section 2513. Because S is treated as transferring one-half of the property to T's grandchild, S becomes the transferor of one-half of the trust for purposes of chapter 13. Because the value of the trust would be includible in T's gross estate if T died immediately after the transfer, S's transfer is subject to an ETIP. If S should die prior to the termination of the trust, S's executor may allocate S's GST exemption to the trust, but only to the portion of the trust for which S is treated as the transferor. However, the allocation does not become effective until the earlier of the expiration of T's income interest or T's death.

Example 4. Transfer of retained interest as ETIP termination. The trust instrument provides that trust income is to be paid to T for 9 years or until T's prior death. The trust principal is to be paid to T's grandchild on the termination of T's income interest. Four years after the initial transfer, T transfers the income interest to T's sibling. The ETIP with respect to the trust terminates on T's transfer of the income interest because, after the transfer, the trust property would not be includible in T's gross estate (other than by reason of section 2035) if T died at that time.

(d) *Allocations after the transferor's death*—(1) *Allocation by executor*. Except as otherwise provided in this paragraph (d), an allocation of a decedent's unused GST exemption by the executor of the decedent's estate is made on the appropriate United States Estate (and Generation-Skipping Transfer) Tax Return (Form 706 or Form 706NA) filed on or before the date prescribed for filing the return by section 6075(a) (including any extensions actually granted (the due date)). An allocation of GST exemption with respect to property included in the gross estate of a decedent is effective as of the date of death. A timely allocation of GST exemption by an executor with respect to a lifetime transfer of property that is not included in the transferor's gross estate is made on a Form 709. A late allocation of GST exemption by an executor, other than an allocation that is deemed to be made under section 2632(b)(1), with respect to a lifetime transfer of property is made on Form 706 or Form 706NA and is effective as of the date the allocation is filed. An allocation of GST exemption to a trust (whether or not funded at the time the Form 706 or Form 706NA is filed) is effective if the notice of allocation clearly identifies the trust and the amount of the decedent's GST exemption allocated to the trust. An executor may allocate the decedent's GST exemption by use of a formula. For purposes of this section, an allocation is void if the allocation is made for a trust that has no GST potential with respect to the transferor for whom the allocation is being made, as of the date of the transferor's death. For this purpose, a trust has GST potential even if the possibility of a GST is so remote as to be negligible.

(2) *Automatic allocation after death*. A decedent's unused GST exemption is automatically allocated on the due date for filing Form 706 or Form 706NA to the extent not otherwise allocated by the decedent's executor on or before that date. The automatic allocation occurs whether or not a return is actually required to be filed. Unused GST exemption is allocated pro rata (subject to the rules of §26.2642–2(b)), on the basis of the value of the property as finally determined for purposes of chapter 11 (chapter 11 value), first to direct skips treated as occurring at the transferor's death. The balance, if any, of unused GST exemption is allocated pro rata (subject to the rules of §26.2642–2(b)) on the basis of the chapter 11 value of the nonexempt portion of the trust property (or in the case of trusts that are not included in the gross estate, on the basis of the date of death value of the trust) to trusts with respect to which a taxable termination may occur or from which a taxable distribution may be made. The automatic allocation of GST exemption is irrevocable, and an allocation made by the executor after the automatic allocation is made is ineffective. No automatic allocation of GST exemption is made to a trust that will have a new transferor with respect to the entire trust prior to the occurrence of any GST with respect to the trust. In addition, no automatic allocation of GST exemption is made to a trust if, during the nine month period ending immediately after the death of the transferor—

(i) No GST has occurred with respect to the trust; and

(ii) At the end of such period no future GST can occur with respect to the trust.

§26.2641–1 Applicable rate of tax.

The rate of tax applicable to any GST (applicable rate) is determined by multiplying the maximum Federal estate tax rate in effect at the time of the GST by the inclusion ratio (as defined in §26.2642–1). For this purpose, the maximum Federal estate tax rate is the maximum rate set forth under section 2001(c) (without regard to section 2001(c)(2)).

§26.2642–1 Inclusion ratio.

(a) *In general*. Except as otherwise provided in this section, the inclusion ratio is determined by subtracting the applicable fraction (rounded to the nearest one-thousandth (.001)) from 1. In rounding the applicable fraction to the nearest one-thousandth, any amount that is midway between one one-thousandth and another one-thousandth is rounded up to the higher of those two amounts.

(b) *Numerator of applicable fraction*—(1) *In general*. Except as otherwise provided in this paragraph (b), and in §§26.2642–3 (providing a special rule for charitable lead annuity trusts) and 26.2642–4 (providing rules for the redetermination of the applicable fraction), the numerator of the applicable fraction is the amount of GST exemption allocated to the trust (or to the transferred property in the case of a direct skip not in trust).

(2) *GSTs occurring during an ETIP*—(i) *In general*. For purposes of determining the inclusion ratio with respect to a taxable termination or a taxable distribution that occurs during an ETIP, the numerator of the applicable fraction is the sum of—

(A) The GST exemption previously allocated to the trust (including any allocation made to the trust prior to any taxable termination or distribution) reduced (but not below zero) by the nontax amount of any prior GSTs with respect to the trust; and

(B) Any GST exemption allocated to the trust on a timely ETIP return filed after the termination of the ETIP. See §26.2632–1(c)(5) *Example 2*.

(ii) *Nontax amount of a prior GST*. (*1*) The nontax amount of a prior GST with respect to the trust is the amount of the GST multiplied by the applicable fraction attributable to the trust at the time of the prior GST.

(*2*) For rules regarding the allocation of GST exemption to property during an ETIP, see §26.2632–1(c).

(c) *Denominator of applicable fraction*—(1) *In general*. Except as otherwise provided in this paragraph (c) and in §§26.2642–3 and 26.2642–4, the denominator of the applicable fraction is the value of the property transferred to the trust (or transferred in a direct skip not in trust) (as determined under §26.2642–2) reduced by the sum of—

(i) Any Federal estate tax and any State death tax incurred by reason of the transfer that is chargeable to the trust and is actually recovered from the trust;

(ii) The amount of any charitable deduction allowed under section 2055, 2106, or 2522 with respect to the transfer; and

(iii) In the case of a direct skip, the value of the portion of the transfer that is a nontaxable gift. See paragraph (c)(3) of this section for the definition of nontaxable gift.

(2) *Zero denominator*. If the denominator of the applicable fraction is zero, the inclusion ratio is zero.

(3) *Nontaxable gifts*. Generally, for purposes of chapter 13, a transfer is a nontaxable gift to the extent the transfer is excluded from taxable gifts by reason of section 2503(b) (after application of section 2513) or section 2503(e). However, a transfer to a trust for the benefit of an individual is not a nontaxable gift for purposes of this section unless—

(i) Trust principal or income may, during the individual's lifetime, be distributed only to or for the benefit of the individual; and

(ii) The assets of the trust will be includible in the gross estate of the individual if the individual dies before the trust terminates.

(d) *Examples*. The following examples illustrate the provisions of this section. See §26.2652–2(d) *Examples 2* and *3* for illustrations of the computation of the inclusion ratio where the special (reverse QTIP) election may be applicable.

Example 1. Computation of the inclusion ratio. T transfers $100,000 to a newly-created irrevocable trust providing that income is to be accumulated for 10 years. At the end of 10 years, the accumulated income is to be distributed to T's child, C, and the trust principal is to be paid to T's grandchild. T allocates $40,000 of T's GST exemption to the trust on a timely-filed gift tax return. The applicable fraction with respect to the trust is .40 ($40,000 (the amount of GST exemption allocated to the trust) over $100,000 (the value of the property transferred to the trust)). The inclusion ratio is .60 (1 – .40). If the maximum Federal estate tax rate is 55 percent at the time of a GST, the rate of tax applicable to the transfer (applicable rate) will be .333 (55 percent (the maximum estate tax rate) × .60 (the inclusion ratio)).

Example 2. Gift entirely nontaxable. On December 1, 1996, T transfers $10,000 to an irrevocable trust for the benefit of T's grandchild, GC. GC possesses a right to withdraw any contributions to the trust such that the entire transfer qualifies for the annual exclusion under section 2503(b). Under the terms of the trust, the income is to be paid to GC for 10 years or until GC's prior death. Upon the expiration of GC's income interest, the trust principal is payable to GC or GC's estate. The transfer to the trust is a direct skip. T made no prior gifts to or for the benefit of GC during 1996. The entire $10,000 transfer is a nontaxable transfer. For purposes of computing the tax on the direct skip, the denominator of the applicable fraction is zero, and thus, the inclusion ratio is zero.

Example 3. Gift nontaxable in part. T transfers $12,000 to an irrevocable trust for the benefit of T's grandchild, GC. Under the terms of the trust, the income is to be paid to GC for 10 years or until GC's prior death. Upon the expiration of GC's income interest, the trust principal is payable to GC or GC's estate. Further, GC has the right to withdraw $10,000 of any contribution to the trust such that $10,000 of the transfer qualifies for the annual exclusion under section 2503(b). The amount of the nontaxable transfer is $10,000. Solely for purposes of computing the tax on the direct skip, T's transfer is divided into two portions. One portion is equal to the amount of the nontaxable transfer ($10,000) and has a zero inclusion ratio; the other portion is $2,000 ($12,000 – $10,000). With respect to the $2,000 portion, the denominator of the applicable fraction is $2,000. Assuming that T has sufficient GST exemption available, the numerator of the applicable fraction is $2,000 (unless T elects to have the automatic allocation provisions not apply). Thus, assuming T does not elect to have the automatic allocation not apply, the applicable fraction is one ($2,000/$2,000 = 1) and the inclusion ratio is zero (1 – 1 = 0).

Example 4. Gift nontaxable in part. Assume the same facts as in *Example 3*, except T files a timely Form 709 electing that the automatic allocation of GST exemption not apply to the $12,000 transferred in the direct skip. T's transfer is divided into two portions, a $10,000 portion with a zero inclusion ratio and a $2,000 portion with an applicable fraction of zero (0/$2,000 = 0) and an inclusion ratio of one (1 – 0 = 1).

§26.2642–2 Valuation.

(a) *Lifetime transfers*—(1) *In general*. For purposes of determining the denominator of the applicable fraction, the value of property transferred during life is its fair market value on the effective date of the allocation of GST exemption. In the case of a timely allocation under §26.2632–1(b)(2)(ii), the denominator of the applicable fraction is the fair market value of the property as finally determined for purposes of chapter 12.

(2) *Special rule for late allocations during life*. If a transferor makes a late allocation of GST exemption to a trust, the value of the property transferred to the trust is the fair market value of the trust assets determined on the effective date of the allocation of GST exemption. Except as otherwise provided in this paragraph (a)(2), if a transferor makes a late allocation of GST exemption to a trust, the transferor may, solely for purposes of determining the fair market value of the trust assets, elect to treat the allocation as having been made on the first day of the month during which the late allocation is made (valuation date). An election under this paragraph (a)(2) is not effective with respect to a life insurance policy or a trust holding a life insurance policy, if the insured individual has died. An allocation subject to the election contained in this paragraph (a)(2) is not effective until it is actually filed with the Internal Revenue Service. The election is made by stating on the Form 709 on which the allocation is made—

(i) That the election is being made;

(ii) The applicable valuation date; and

(iii) The fair market value of the trust assets on the valuation date.

(b) *Transfers at death*—(1) *In general*. Except as provided in paragraphs (b)(2) and (3) of this section, in determining the denominator of the applicable fraction, the value of property included in the decedent's gross estate is its value for purposes of chapter 11. In the case of qualified real property with respect to which the election under section 2032A is made, the value of the property is the value determined under section 2032A provided the recapture agreement described in section 2032A(d)(2) filed with the Internal Revenue Service specifically provides for the signatories' consent to the imposition of, and personal liability for, additional GST tax in the event an additional estate tax is imposed under section 2032A(c). See §26.2642–4(a)(4). If the recapture agreement does not contain these provisions, the value of qualified real property as to which the election under section 2032A is made is the fair market value of the property determined without regard to the provisions of section 2032A.

(2) *Special rule for pecuniary payments*—(i) *In general*. If a pecuniary payment is satisfied with cash, the denominator of the applicable fraction

is the pecuniary amount. If property other than cash is used to satisfy a pecuniary payment, the denominator of the applicable fraction is the pecuniary amount only if payment must be made with property on the basis of the value of the property on—

(A) The date of distribution; or

(B) A date other than the date of distribution, but only if the pecuniary payment must be satisfied on a basis that fairly reflects net appreciation and depreciation (occurring between the valuation date and the date of distribution) in all of the assets from which the distribution could have been made.

(ii) *Other pecuniary amounts payable in kind*. The denominator of the applicable fraction with respect to any property used to satisfy any other pecuniary payment payable in kind is the date of distribution value of the property.

(3) *Special rule for residual transfers after payment of a pecuniary payment*—(i) *In general*. Except as otherwise provided in this paragraph (b)(3), the denominator of the applicable fraction with respect to a residual transfer of property after the satisfaction of a pecuniary payment is the estate tax value of the assets available to satisfy the pecuniary payment reduced, if the pecuniary payment carries appropriate interest (as defined in paragraph (b)(4) of this section), by the pecuniary amount. The denominator of the applicable fraction with respect to a residual transfer of property after the satisfaction of a pecuniary payment that does not carry appropriate interest is the estate tax value of the assets available to satisfy the pecuniary payment reduced by the present value of the pecuniary payment. For purposes of this paragraph (b)(3)(i), the present value of the pecuniary payment is determined by using—

(A) The interest rate applicable under section 7520 at the death of the transferor; and

(B) The period between the date of the transferor's death and the date the pecuniary amount is paid.

(ii) *Special rule for residual transfers after pecuniary payments payable in kind*. The denominator of the applicable fraction with respect to any residual transfer after satisfaction of a pecuniary payment payable in kind is the date of distribution value of the property distributed in satisfaction of the residual transfer, unless the pecuniary payment must be satisfied on the basis of the value of the property on—

(A) The date of distribution; or

(B) A date other than the date of distribution, but only if the pecuniary payment must be satisfied on a basis that fairly reflects net appreciation and depreciation (occurring between the date of death and the date of distribution) in all of the assets from which the distribution could have been made.

(4) *Appropriate interest*—(i) *In general*. For purposes of this section and §26.2654–1 (relating to certain trusts treated as separate trusts), appropriate interest means that interest must be payable from the date of death of the transferor (or from the date specified under applicable State law requiring the payment of interest) to the date of payment at a rate—

(A) At least equal to—

(*1*) The statutory rate of interest, if any, applicable to pecuniary bequests under the law of the State whose law governs the administration of the estate or trust; or

(*2*) If no such rate is indicated under applicable State law, 80 percent of the rate that is applicable under section 7520 at the death of the transferor; and

(B) Not in excess of the greater of—

(*1*) The statutory rate of interest, if any, applicable to pecuniary bequests under the law of the State whose law governs the administration of the trust; or

(*2*) 120 percent of the rate that is applicable under section 7520 at the death of the transferor.

(ii) *Pecuniary payments deemed to carry appropriate interest*. For purposes of this paragraph (b)(4), if a pecuniary payment does not carry appropriate interest, the pecuniary payment is considered to carry appropriate interest to the extent—

(A) The entire payment is made or property is irrevocably set aside to satisfy the entire pecuniary payment within 15 months of the transferor's death; or

(B) The governing instrument or applicable local law specifically requires the executor or trustee to allocate to the pecuniary payment a pro rata share of the income earned by the fund from which the pecuniary payment is to be made between the date of death of the transferor and the date of payment. For purposes of paragraph (b)(4)(ii)(A) of this section, property is irrevocably set aside if it is segregated and held in a separate account pending distribution.

(c) *Examples*. The following examples illustrate the provisions of this section:

Example 1. T transfers $100,000 to a newly-created irrevocable trust on December 15, 1996. The trust provides that income is to be paid to T's child for 10 years. At the end of the 10-year period, the trust principal is to be paid to T's grandchild. T does not allocate any GST exemption to the trust on the gift tax return reporting the transfer. On November 15, 1997, T files a Form 709 allocating $50,000 of GST exemption to the trust. Because the allocation was made on a late filed return, the value of the property transferred to the trust is determined on the date the allocation is filed (unless an election is made pursuant to paragraph (a)(2) of this section to value the trust property as of the first day of the month in which the allocation document is filed with the Internal Revenue Service). On November 15, 1997, the value of the trust property is $150,000. Effective as of November 15, 1997, the applicable fraction with respect to the trust is .333 ($50,000 (the amount of GST exemption allocated to the trust) over $150,000 (the value of the trust principal on the effective date of the GST exemption allocation)), and the inclusion ratio is .667 (1.0 – .333).

Example 2. The facts are the same as in *Example 1*, except the value of the trust property is $80,000 on November 15, 1997. The applicable fraction is .625 ($50,000 over $80,000) and the inclusion ratio is .375 (1.0 – .625).

Example 3. T transfers $100,000 to a newly-created irrevocable trust on December 15, 1996. The trust provides that income is to be paid to T's child for 10 years. At the end of the 10-year period, the trust principal is to be paid to T's grandchild. T does not allocate any GST exemption to the trust on the gift tax return reporting the transfer. On November 15, 1997, T files a Form 709 allocating $50,000 of GST exemption to the trust. T elects to value the trust principal on the first day of the month in which the allocation is made pursuant to the election provided in paragraph (a)(2) of this section. Because the late allocation is made in November, the value of the trust is determined as of November 1, 1997.

§26.2642–3 Special rule for charitable lead annuity trusts.

(a) *In general*. In determining the applicable fraction with respect to a charitable lead annuity trust—

(1) The numerator is the adjusted generation-skipping transfer tax exemption (adjusted GST exemption); and

(2) The denominator is the value of all property in the trust immediately after the termination of the charitable lead annuity.

(b) *Adjusted GST exemption defined*. The adjusted GST exemption is the amount of GST exemption allocated to the trust increased by an amount equal to the interest that would accrue if an amount equal to the allocated GST exemption were invested at the rate used to determine the amount of the estate or gift tax charitable deduction, compounded annually, for the actual period of the charitable lead annuity. If a late allocation is made to a charitable lead annuity trust, the adjusted GST exemption is the amount of GST exemption allocated to the trust increased by the interest that would accrue if invested at such rate for the period beginning on the date of the late allocation and extending for the balance of the actual period of the charitable lead annuity. The amount of GST exemption allocated to a charitable lead annuity trust is not reduced even though it is ultimately determined that the allocation of a lesser amount of GST exemption would have resulted in an inclusion ratio of zero. For purposes of chapter 13, a charitable lead annuity trust is any trust providing an interest in the form of a guaranteed annuity described in §25.2522(c)–3(c)(2)(vi) of this chapter for which the transferor is allowed a charitable deduction for Federal estate or gift tax purposes.

(c) *Example*. The following example illustrates the provisions of this section:

Example. T creates a charitable lead annuity trust for a 10-year term with the remainder payable to T's grandchild. T timely allocates an amount of GST exemption to the trust which T expects will ultimately result in a zero inclusion ratio. However, at the end of the charitable lead interest, because the property has not appreciated to the extent T anticipated, the numerator of the applicable fraction is greater than the denominator. The inclusion ratio for the trust is zero. No portion of the GST exemption allocated to the trust is restored to T or to T's estate.

§26.2642–4 Redetermination of applicable fraction.

(a) *In general*. The applicable fraction for a trust is redetermined whenever additional exemption is allocated to the trust or when certain changes occur with respect to the principal of the trust. Except as otherwise provided in this paragraph (a), the numerator of the redetermined applicable fraction is the sum of the amount of GST exemption currently being allocated to the trust (if any) plus the value of the nontax portion of the trust, and the denominator of the redetermined applicable fraction is the value of the trust principal immediately after the event occurs. The nontax portion of a trust is determined by multiplying the value of the trust assets, determined immediately prior to the event, by the then applicable fraction.

(1) *Multiple transfers to a single trust*. If property is added to an existing trust, the denominator of the redetermined applicable fraction is the value of the trust immediately after the addition reduced as provided in §26.2642–1(c).

(2) *Consolidation of separate trusts*. If separate trusts created by one transferor are consolidated, a single applicable fraction for the consolidated trust is determined. The numerator of the redetermined applicable fraction is the sum of the nontax portions of each trust immediately prior to the consolidation.

(3) *Property included in transferor's gross estate*. If the value of property held in a trust created by the transferor, with respect to which an allocation was made at a time that the trust was not subject to an ETIP, is included in the transferor's gross estate, the applicable fraction is redetermined if additional GST exemption is allocated to the property. The numerator of the redetermined applicable fraction is an amount equal to the nontax portion of the property immediately after the death of the transferor increased by the amount of GST exemption allocated by the executor of the transferor's estate to the trust. If additional GST exemption is not allocated to the trust, the applicable fraction immediately before death is not changed, if the trust was not subject to an ETIP at the time GST exemption was allocated to the trust. The denominator of the applicable fraction is reduced to reflect any federal or state, estate or inheritance taxes paid from the trust.

(4) *Imposition of recapture tax under section 2032A*—(i) If an additional estate tax is imposed under section 2032A and if the section 2032A election was effective (under §26.2642–2(b)) for purposes of the GST tax, the applicable fraction with respect to the property is redetermined as of the date of death of the transferor. In making the redetermination, any available GST exemption not allocated at the death of the transferor (or at a prior recapture event) is automatically allocated to the property. The denominator of the applicable fraction is the fair market value of the property at the date of the transferor's death reduced as provided in §26.2642–1(c) and further reduced by the amount of the additional GST tax actually recovered from the trust.

(ii) The GST tax imposed with respect to any taxable termination, taxable distribution, or direct skip occurring prior to the recapture event is recomputed based on the applicable fraction as redetermined. Any additional GST tax as recomputed is due and payable on the date that is six months after the event that causes the imposition of the additional estate tax under section 2032A. The additional GST tax is remitted with Form 706-A and is reported by attaching a statement to Form 706–A showing the computation of the additional GST tax.

(iii) The applicable fraction, as redetermined under this section, is also used in determining any GST tax imposed with respect to GSTs occurring after the date of the recapture event.

(b) *Examples*. The following examples illustrate the principles of this section:

Example 1. Allocation of additional exemption. T transfers $200,000 to an irrevocable trust under which the income is payable to T's child, C, for life. Upon the termination of the trust, the remainder is payable to T's grandchild, GC. At a time when no ETIP exists with respect to the trust property, T makes a timely allocation of $100,000 of GST exemption, resulting in an inclusion ratio of .50. Subsequently, when the entire trust property is valued at $500,000, T allocates an additional $100,000 of T's unused GST exemption to the trust. The inclusion ratio of the trust is recomputed at that time. The numerator of the applicable fraction is $350,000 ($250,000 (the nontax portion as of the date of the allocation) plus $100,000 (the GST exemption currently being allocated)). The denominator is $500,000 (the date of allocation fair market value of the trust). The inclusion ratio is .30 (1 – .70).

Example 2. Multiple transfers to a trust, allocation both timely and late. On December 10, 1993, T transfers $10,000 to an irrevocable trust that does not satisfy the requirements of section 2642(c)(2). T makes identical transfers to the trust on December 10, 1994, 1995, 1996, and on January 15, 1997. Immediately after the transfer on January 15, 1997, the value of the trust principal is $40,000. On January 14, 1998, when the value of the trust principal is $50,000, T allocates $30,000 of GST exemption to the trust. T discloses the 1997 transfer on the Form 709 filed on January 14, 1998. Thus, T's allocation is a timely allocation with respect to the transfer in 1997, $10,000 of the allocation is effective as of the date of that transfer, and, on and after January 15, 1997, the inclusion ratio of the trust is .75 (1 – ($10,000/$40,000)). The balance of the allocation is a late allocation with respect to prior transfers to the trust and is effective as of January 14, 1998. In redetermining the inclusion ratio as of that date, the numerator of the redetermined applicable fraction is $32,500 ($12,500 (.25 × $50,000), the nontax portion of the trust on January 14, 1998) plus $20,000 (the amount of GST exemption allocated late to the trust). The denominator of the new applicable fraction is $50,000 (the value of the trust principal at the time of the late allocation).

Example 3. Excess allocation. (i) T creates an irrevocable trust for the benefit of T's child and grandchild in 1996 transferring $50,000 to the trust on the date of creation. T allocates no GST exemption to the trust on the Form 709 reporting the transfer. On July 1, 1997 (when the value of the trust property is $60,000), T transfers an additional $40,000 to the trust.

(ii) On April 15, 1998, when the value of the trust is $150,000, T files a Form 709 reporting the 1997 transfer and allocating $150,000 of GST exemption to the trust. The allocation is a timely allocation of $40,000 with respect to the 1997 transfer and is effective as of that date. Thus, the applicable fraction for the trust as of July 1, 1997 is .40 ($40,000/$100,000 ($40,000 + $60,000)).

(iii) The allocation is also a late allocation of $90,000, the amount necessary to attain a zero inclusion ratio on April 15, 1998, computed as follows: $60,000 (the nontax portion immediately prior to the allocation (.40 × $150,000)) plus $90,000 (the additional allocation necessary to produce a zero inclusion ratio based on a denominator of $150,000)/$150,000 equals one and, thus, an inclusion ratio of zero. The balance of the allocation, $20,000 ($150,000 less the timely allocation of $40,000 less the late allocation of $90,000) is void.

Example 4. Undisclosed transfer. (i) The facts are the same as in *Example 3*, except that on February 1, 1998 (when the value of the trust is $150,000), T transfers an additional $50,000 to the trust and the value of the entire trust corpus on April 15, 1998 is $220,000. The Form 709 filed on April 15, 1998 does not disclose the 1998 transfer. Under the rule in §26.2632–1(b)(2)(ii), the allocation is effective first as a timely allocation to the 1997 transfer; second, as a late allocation to the trust as of April 15, 1998; and, finally as a timely allocation to the February 1, 1998 transfer. As of April 15, 1998, $55,000, a pro rata portion of the trust assets, is considered to be the property transferred to the trust on February 1, 1998 (($50,000/$200,000) × $220,000). The balance of the trust, $165,000, represents prior transfers to the trust.

(ii) As in *Example 3*, the allocation is a timely allocation as to the 1997 transfer (and the applicable fraction as of July 1, 1997 is .40) and a late allocation as of 1998. The amount of the late allocation is $99,000, computed as follows: (.40 × $165,000 plus $99,000)/$165,000 = one.

(iii) The balance of the allocation, $11,000 ($150,000 less the timely allocation of $40,000 less the late allocation of $99,000) is a timely allocation as of February 1, 1998. The applicable fraction with respect to the trust, as of February 1, 1998, is .355, computed as follows: $60,000 (the nontax portion of the trust immediately prior to the February 1, 1998 transfer (.40 × $150,000)) plus $11,000 (the amount of the timely allocation to the 1998 transfer)/$200,000 (the value of the trust on February 1, 1998, after the transfer on that date) = $71,000/$200,000 = .355.

(iv) The applicable fraction with respect to the trust, as of April 15, 1998, is .805 computed as follows: $78,100 (the nontax portion immediately prior to the allocation (.355 × $220,000)) plus $99,000 (the amount of the late allocation)/$220,000 = $177,100/$220,000 = .805.

Example 5. Redetermination of inclusion ratio on ETIP termination. (i) T transfers $100,000 to an irrevocable trust. The trust instrument provides that trust income is to be paid to T for 9 years or until T's prior death. The trust principal is to be paid to T's grandchild, GC, on the termination of T's income interest. The trustee has the power to invade trust principal for the benefit of GC during the term of T's income interest. The trust is subject to an ETIP while T holds the retained income interest. T files a timely Form 709 reporting the transfer and allocates $100,000 of GST exemption to the trust. In year 4, when the value of the trust is $200,000, the trustee distributes $15,000 to GC. The distribution is a taxable distribution. Because of the existence of the ETIP, the inclusion ratio with respect to the taxable distribution is determined immediately prior to the occurrence of the GST. Thus, the inclusion ratio applicable to the year 4 GST is .50 (1 – ($100,000/$200,000 = .50).

(ii) In year 5, when the value of the trust is again $200,000, the trustee distributes another $15,000 to GC. Because the trust is still subject to the ETIP in year 5, the inclusion ratio with respect to the year 5 GST is again computed immediately prior to the GST. In computing the new inclusion ratio, the numerator of the applicable fraction is reduced by the nontax portion of prior GSTs occurring during the ETIP. Thus, the numerator of the applicable fraction with respect to the GST in year 5 is $92,500 ($100,000 – (.50 × $15,000)) and the inclusion ratio applicable with respect to the GST in year 5 is .537 (1 – ($92,500/$200,000) = .463). Any additional GST exemption allocated on a timely ETIP return with respect to the GST in year 5 is effective immediately prior to the transfer.

§26.2642–5 Finality of inclusion ratio.

(a) *Direct skips.* The inclusion ratio applicable to a direct skip becomes final when no additional GST tax (including additional GST tax payable as a result of a cessation, etc. of qualified use under section 2032A(c)) may be assessed with respect to the direct skip.

(b) *Other GSTs.* With respect to taxable distributions and taxable terminations, the inclusion ratio for a trust becomes final, on the later of—

(1) The expiration of the period for assessment with respect to the first GST tax return filed using that inclusion ratio; (unless the trust is subject to an election under section 2032A in which case the applicable date under this subsection is the expiration of the period of assessment of any additional GST tax due as a result of a cessation, etc. of qualified use under section 2032A); or

(2) The expiration of the period for assessment of Federal estate tax with respect to the estate of the transferor. For purposes of this paragraph (b)(2), if an estate tax return is not required to be filed, the period for assessment is determined as if a return were required to be filed and as if the return were timely filed within the period prescribed by section 6075(a).

§26.2652–1 Transferor defined; other definitions.

(a) *Transferor defined*—(1) *In general.* Except as otherwise provided in paragraph (a)(3) of this section, the individual with respect to whom property was most recently subject to Federal estate or gift tax is the transferor of that property for purposes of chapter 13. An individual is treated as transferring any property with respect to which the individual is the transferor. Thus, an individual may be a transferor even though there is no transfer of property under local law at the time the Federal estate or gift tax applies. For purposes of this paragraph, a surviving spouse is the transferor of a qualified domestic trust created by the deceased spouse that is included in the surviving spouse's gross estate, provided the trust is not subject to the election described in §26.2652–2 (reverse QTIP election). A surviving spouse is also the transferor of a qualified domestic trust created by the surviving spouse pursuant to section 2056(d)(2)(B).

(2) *Transfers subject to Federal estate or gift tax.* For purposes of this section, a transfer is subject to Federal gift tax if a gift tax is imposed under section 2501(a). A transfer is subject to Federal estate tax if the value of the property is includible in the decedent's gross estate as determined under section 2031 or section 2103.

(3) *Special rule for certain QTIP trusts.* Solely for purposes of chapter 13, if a transferor of qualified terminable interest property (QTIP) elects under §26.2652–2(a) to treat the property as if the QTIP election had not been made (reverse QTIP election), the identity of the transferor of the property is determined without regard to the application of sections 2044, 2207A, and 2519.

(4) *Exercise of certain nongeneral powers of appointment.* The exercise of a power of appointment that is not a general power of appointment (as defined in section 2041(b)) is treated as a transfer subject to Federal estate or gift tax by the holder of the power if the power is exercised in a manner that

may postpone or suspend the vesting, absolute ownership, or power of alienation of an interest in property for a period, measured from the date of creation of the trust, extending beyond any specified life in being at the date of creation of the trust plus a period of 21 years plus, if necessary, a reasonable period of gestation (perpetuities period). For purposes of this paragraph (a)(4), the exercise of a power of appointment that validly postpones or suspends the vesting, absolute ownership, or power of alienation of an interest in property for a term of years that will not exceed 90 years (measured from the date of creation of the trust) is not an exercise that may extend beyond the perpetuities period.

(5) *Split-gift transfers*. In the case of a transfer with respect to which the donor's spouse makes an election under section 2513 to treat the gift as made one-half by the spouse, the electing spouse is treated as the transferor of one-half of the entire value of the property transferred by the donor, regardless of the interest the electing spouse is actually deemed to have transferred under section 2513. The donor is treated as the transferor of one-half of the value of the entire property. See §26.2632–1(c)(5) *Example 3*, regarding allocation of GST exemption with respect to split-gift transfers subject to an ETIP.

(6) *Examples*. The following examples illustrate the principles of this paragraph (a):

Example 1. Identity of transferor. T transfers $100,000 to a trust for the sole benefit of T's grandchild. The transfer is a completed gift under §25.2511–2 of this chapter. Thus, for purposes of chapter 13, T is the transferor of the $100,000. It is immaterial that a portion of the transfer is excluded from the total amount of T's taxable gift by reason of section 2503(b).

Example 2. Gift splitting and identity of transferor. The facts are the same as in *Example 1*, except T's spouse, S, consents under section 2513 to split the gift with T. For purposes of chapter 13, S and T are each treated as a transferor of $50,000 to the trust.

Example 3. Change of transferor on subsequent transfer tax event. T transfers $100,000 to a trust providing that all the net trust income is to be paid to T's spouse, S, for S's lifetime. T elects under section 2523(f) to treat the transfer as a transfer of qualified terminable interest property, and T does not make the reverse QTIP election under section 2652(a)(3). On S's death, the trust property is included in S's gross estate under section 2044. Thus, S becomes the transferor at the time of S's death.

Example 4. Effect of transfer of an interest in trust on identity of the transferor. T transfers $100,000 to a trust providing that all of the net income is to be paid to T's child, C, for C's lifetime. At C's death, the trust property is to be paid to T's grandchild. C transfers the income interest to X, an unrelated party, in a transfer that is a completed transfer for Federal gift tax purposes. Because C's transfer is a transfer of a term interest in the trust that does not affect the rights of other parties with respect to the trust property, T remains the transferor with respect to the trust.

Example 5. Effect of lapse of withdrawal right on identity of transferor. T transfers $10,000 to a new trust providing that the trust income is to be paid to T's child, C, for C's life and, on the death of C, the trust principal is to be paid to T's grandchild, GC. The trustee has discretion to distribute principal for GC's benefit during C's lifetime. C has a right to withdraw $10,000 from the trust for a 60-day period following the transfer. Thereafter, the power lapses. C does not exercise the withdrawal right. The transfer by T is a completed transfer within the meaning of §25.2511–2 of this chapter and, thus, T is treated as having transferred the entire $10,000 to the trust. On the lapse of the withdrawal right, C becomes a transferor to the extent C is treated as having made a completed transfer for purposes of chapter 12. Therefore, except to the extent that the amount with respect to which the power of withdrawal lapses exceeds the greater of $5,000 or 5% of the value of the trust property, T remains the transferor of the trust property for purposes of chapter 13.

Example 6. Effect of reverse QTIP election on identity of the transferor. T establishes a testamentary trust having a principal of $500,000. Under the terms of the trust, all trust income is payable to T's surviving spouse, S, during S's lifetime. T's executor makes an election to treat the trust property as qualified terminable interest property and also makes the reverse QTIP election. For purposes of chapter 13, T is the transferor with respect to the trust. On S's death, the then full fair market value of the trust is includible in S's gross estate under section 2044. However, because of the reverse QTIP election, S does not become the transferor with respect to the trust; T continues to be the transferor.

Example 7. Effect of reverse QTIP election on constructive additions. The facts are the same as in *Example 6*, except the inclusion of the QTIP trust in S's gross estate increased the Federal estate tax liability of S's estate by $200,000. The estate does not exercise the right of recovery from the trust granted under section 2207A. Under local law, the beneficiaries of S's residuary estate (which bears all estate taxes under the will) could compel the executor to exercise the right of recovery but do not do so. Solely for purposes of chapter 13, the beneficiaries of the residuary estate are not treated as having made an addition to the trust by reason of their failure to exercise their right of recovery. Because of the reverse QTIP election, for GST purposes, the trust property is not treated as includible in S's gross estate and, under those circumstances, no right of recovery exists.

Example 8. Effect of reverse QTIP election on constructive additions. S, the surviving spouse of T, dies testate. At the time of S's death, S was the beneficiary of a trust with respect to which T's executor made a QTIP election under section 2056(b)(7). Thus, the trust is includible in S's gross estate under section 2044. T's executor also made the reverse QTIP election with respect to the trust. S's will provides that all death taxes payable with respect to the trust are payable from S's residuary estate. Since the transferor of the property is determined without regard to section 2044 and section 2207A, S is not treated as making a constructive addition to the trust by reason of the tax apportionment clause in S's will.

Example 9. Exercise of a nongeneral power of appointment. On May 15, 1990, T established an irrevocable trust under which the trust income is to be paid to T's child, C, for life. C is given a testamentary power to appoint the remainder in further trust for the benefit of C's issue. In default of C's exercise of the power, the remainder is to pass to charity. C dies on February 3, 1997, survived by two children and a sibling, S (who was born prior to May 15, 1990). C exercises the power in a manner that validly extends the trust in favor of C's issue until the later of May 15, 2070 (80 years from the date the trust was created), or the death of S. C's exercise of the power is considered a transfer by C that is subject to the estate or gift tax because it may extend the term of the trust beyond the perpetuities period.

Example 10. Exercise of a nongeneral power of appointment. The facts are the same as in *Example 9*, except local law provides that the effect of C's exercise is to extend the term of the trust until May 15, 2070, whether or not S survives that date. C is not treated as having made a transfer to the trust as a result of the exercise of the power because the exercise of the power does not extend the term of the trust beyond a period of 90 years measured from the creation of the trust. The result would be the same if the effect of C's exercise is either to extend the term of the trust until the death of S or to extend the term of the trust until the first to occur of May 15, 2070, or the death of S.

Example 11. Split-gift transfers. T transfers $100,000 to an inter vivos trust that provides T with an annuity payable for ten years or until T's prior death. The annuity satisfies the definition of a qualified interest under section 2702(b). When the trust terminates, the corpus is to be paid to T's grandchild, GC. T's spouse, S, consents under section 2513 to have the gift treated as made one-half by S. Under section 2513, only the actuarial value of the gift to GC is eligible to be treated as made one-half by S. However, because S is treated as the donor of one-half of the gift to GC, S becomes the transferor of one-half of the entire trust ($50,000) for purposes of Chapter 13.

(b) *Trust defined*—(1) *In general*. A trust includes any arrangement (other than an estate) that has substantially the same effect as a trust. Thus, for example, arrangements involving life estates and remainders, estates for years, and insurance and annuity contracts are trusts. Generally, a transfer as to which the identity of the transferee is contingent upon the occurrence of an event is a transfer in trust; however, a transfer of property included in the transferor's gross estate, as to which the identity of the transferee is contingent upon an event that must occur within 6 months of the transferor's death, is not considered a transfer in trust solely by reason of the existence of the contingency.

(2) *Examples*. The following examples illustrate the provisions of this paragraph (b):

Example 1. Uniform gifts to minors transfers. T transfers cash to an account in the name of T's child, C, as custodian for C's child, GC (who is a minor), under a state statute substantially similar to the Uniform Gifts to Minors Act. For purposes of chapter 13, the transfer to the custodial account is treated as a transfer to a trust.

Example 2. Contingent transfers. T bequeaths $200,000 to T's child, C, provided that if C does not survive T by more than 6 months, the bequest is payable to T's grandchild, GC. C dies 4 months after T. The bequest is not a transfer in trust because the contingency that determines the recipient of the bequest must occur within 6 months of T's death. The bequest to GC is a direct skip.

Example 3. Contingent transfers. The facts are the same as in *Example 2,* except C must survive T by 18 months to take the bequest. The bequest is a transfer in trust for purposes of chapter 13, and the death of C is a taxable termination.

(c) *Trustee defined*. The trustee of a trust is the person designated as trustee under local law or, if no such person is so designated, the person in actual or constructive possession of property held in trust.

(d) *Executor defined*. For purposes of chapter 13, the executor is the executor or administrator of the decedent's estate. However, if no executor or administrator is appointed, qualified or acting within the United States, the executor is the fiduciary who is primarily responsible for payment of the decedent's debts and expenses. If there is no such executor, administrator or fiduciary, the executor is the person in actual or constructive possession of the largest portion of the value of the decedent's gross estate.

(e) *Interest in trust*. See §26.2612–1(e) for the definition of *interest in trust*.

§26.2652–2 Special election for qualified terminable interest property.

(a) *In general*. If an election is made to treat property as qualified terminable interest property (QTIP) under section 2523(f) or section 2056(b)(7), the person making the election may, for purposes of chapter 13, elect to treat the property as if the QTIP election had not been made (reverse QTIP election). An election under this section is irrevocable. An election under this section is not effective unless it is made with respect to all of the property in the trust to which the QTIP election applies. See, however, §26.2654–1(b)(1). Property that qualifies for a deduction under section 2056(b)(5) is not eligible for the election under this section.

(b) *Time and manner of making election*. An election under this section is made on the return on which the QTIP election is made. If a protective QTIP election is made, no election under this section is effective unless a protective reverse QTIP election is also made.

(c) *Transitional rule*. If a reverse QTIP election is made with respect to a trust prior to December 27, 1995, and GST exemption has been allocated to that trust, the transferor (or the transferor's executor) may elect to treat the trust as two separate trusts, one of which has a zero inclusion ratio by reason of the transferor's GST exemption previously allocated to the trust. The separate trust with the zero inclusion ratio consists of that fractional share of the value of the entire trust equal to the value of the nontax portion of the trust under §26.2642–4(a). The reverse QTIP election is treated as applying only to the trust with the zero inclusion ratio. An election under this paragraph (c) is made by attaching a statement to a copy of the return on which the reverse QTIP election was made under section 2652(a)(3). The statement must indicate that an election is being made to treat the trust as two separate trusts and must identify the values of the two separate trusts. The statement is to be filed in the same place in which the original return was filed and must be filed before June 24, 1996. A trust subject to the election described in this paragraph is treated as a trust that was created by two transferors. See §26.2654–1(a)(2) for special rules involving trusts with multiple transferors.

(d) *Examples*. The following examples illustrate the provisions of this section:

Example 1. Special (reverse QTIP) election under section 2652(a)(3). T transfers $1,000,000 to a trust providing that all trust income is to be paid to T's spouse, S, for S's lifetime. On S's death, the trust principal is payable to GC, a grandchild of S and T. T elects to treat all of the transfer as a transfer of QTIP and also makes the reverse QTIP election for all of the property. Because of the reverse QTIP election, T continues to be treated as the transferor of the property after S's death for purposes of chapter 13. A taxable termination rather than a direct skip occurs on S's death.

Example 2. Election under transition rule. In 1994, T died leaving $4 million in trust for the benefit of T's surviving spouse, S. On January 16, 1995, T's executor filed T's Form 706 on which the executor elects to treat the entire trust as qualified terminable interest property. The executor also makes a reverse QTIP election. The reverse QTIP election is effective with respect to the entire trust even though T's executor could allocate only $1 million of GST exemption to the trust. T's executor may elect to treat the trust as two separate trusts, one having a value of 25% of the value of the single trust and an inclusion ratio of zero, but only if the election is made prior to June 24, 1996. If the executor makes the transitional election, the other separate trust, having a value of 75% of the value of the single trust and an inclusion ratio of one, is not treated as subject to the reverse QTIP election.

Example 3. Denominator of the applicable fraction of QTIP trust. T bequeaths $1,500,000 to a trust in which T's surviving spouse, S, receives an income interest for life. Upon the death of S, the property is to remain in trust for the benefit of C, the child of T and S. Upon C's death, the trust is to terminate and the trust property paid to the descendants of C. The bequest qualifies for the estate tax marital deduction under section 2056(b)(7) as QTIP. The executor does not make the reverse QTIP election under section 2652(a)(3). As a result, S becomes the transferor of the trust at S's death when the value of the property in the QTIP trust is included in S's gross estate under section 2044. For purposes of computing the applicable fraction with respect to the QTIP trust upon S's death, the denominator of the fraction is reduced by any Federal estate tax (whether imposed under section 2001, 2101 or 2056A(b)) and State death tax attributable to the trust property that is actually recovered from the trust.

§26.2653–1 Taxation of multiple skips.

(a) *General rule*. If property is held in trust immediately after a GST, solely for purposes of determining whether future events involve a skip person, the transferor is thereafter deemed to occupy the generation immediately above the highest generation of any person holding an interest in the trust immediately after the transfer. If no person holds an interest in the trust immediately after the GST, the transferor is treated as occupying the generation above the highest generation of any person in existence at the time of the GST who then occupies the highest generation level of any person who may subsequently hold an interest in the trust. See §26.2612–1(e) for rules determining when a person has an interest in property held in trust.

(b) *Examples*. The following examples illustrate the provisions of this section:

Example 1. T transfers property to an irrevocable trust for the benefit of T's grandchild, GC, and great-grandchild, GGC. During GC's life, the trust income may be distributed to GC and GGC in the trustee's absolute discretion. At GC's death, the trust property passes to GGC. Both GC and GGC have an interest in the trust for purposes of chapter 13. The transfer by T to the trust is a direct skip, and the property is held in trust immediately after the transfer. After the direct skip, the transferor is treated as being one generation above GC, the highest generation individual having an interest in the trust. Therefore, GC is no longer a skip person and distributions to GC are not taxable distributions. However, because GGC occupies a generation that is two generations below the deemed generation of T, GGC is a skip person and distributions of trust income to GGC are taxable distributions.

Example 2. T transfers property to an irrevocable trust providing that the income is to be paid to T's child, C, for life. At C's death, the trust income is to be accumulated for 10 years and added to principal. At the end of the 10-year accumulation period, the trust income is to be paid to T's grandchild, GC, for life. Upon GC's death, the trust property is to be paid to T's great-grandchild, GGC, or to GGC's estate. A GST occurs at C's death. Immediately after C's death and during the 10-year accumulation period, no person has an interest in the trust within the meaning of section 2652(c) and §26.2612–1(e) because no one can receive current distributions of income or principal. Immediately after C's death, T is treated as occupying the generation above the generation of GC (the trust beneficiary in existence at the time of the GST who then occupies the highest generation level of any person who may subsequently hold an interest in the trust). Thus, subsequent income distributions to GC are not taxable distributions.

§26.2654–1 Certain trusts treated as separate trusts.

(a) *Single trust treated as separate trusts*—(1) *Substantially separate and independent shares*—(i) *In general*. If a single trust consists solely of substantially separate and independent shares for different beneficiaries, the share attributable to each beneficiary (or group of beneficiaries) is treated as a separate trust for purposes of chapter 13. The phrase ''substantially separate and independent shares'' generally has the same meaning as provided in §1.663(c)–3 of this chapter. However, a portion of a trust is not a separate share unless such share exists from and at all times after the creation of the trust. For purposes of this paragraph (a)(1), a trust is treated as created at the date of death of the grantor if the trust is includible in its entirety in the grantor's gross estate for Federal estate tax purposes. Further, treatment of a single trust as separate trusts under this paragraph (a)(1) does not permit treatment of those portions as separate trusts for purposes of filing returns and payment of tax or for purposes of computing any other tax imposed under the Internal Revenue Code. Also, additions to, and distributions from, such trusts are allocated pro rata among the separate trusts, unless the governing instrument expressly provides otherwise.

(ii) *Certain pecuniary amounts*. For purposes of this section, if a person holds the current right to receive a mandatory (i.e., nondiscretionary and noncontingent) payment of a pecuniary amount at the death of the transferor from an inter vivos trust that is includible in the transferor's gross estate, or a testamentary trust, the pecuniary amount is a separate and independent share if—

(A) The trustee is required to pay appropriate interest (as defined in §26.2642–2(b)(4)(i) and (ii)) to the person; or

(B) If the pecuniary amount is payable in kind on the basis of value other than the date of distribution value of the assets, the trustee is required to allocate assets to the pecuniary payment in a manner that fairly reflects net appreciation or depreciation in the value of the assets in the fund available to pay the pecuniary amount measured from the date of death to the date of payment.

(2) *Multiple transferors with respect to single trust*—(i) *In general*. If there is more than one transferor with respect to a trust, the portions of the trust attributable to the different transferors are treated as separate trusts for purposes of chapter 13. Treatment of a single trust as separate trusts under this paragraph (a)(2) does not permit treatment of those portions as separate trusts for purposes of filing returns and payment of tax or for purposes of computing any other tax imposed under the Internal Revenue Code. Also, additions to, and distributions from, such trusts are allocated pro rata among the separate trusts unless otherwise expressly provided in the governing instrument.

(ii) *Addition by a transferor*. If an individual makes an addition to a trust of which the individual is not the sole transferor, the portion of the single trust attributable to each separate trust is determined by multiplying the fair market value of the single trust immediately after the contribution by a fraction. The numerator of the fraction is the value of the separate trust immediately after the contribution. The denominator of the fraction is the fair market value of all the property in the single trust immediately after the transfer.

(3) *Severance of a single trust*. A single trust treated as separate trusts under paragraphs (a)(1) or (2) of this section may be divided at any time into separate trusts to reflect that treatment. For this purpose, the rules of paragraph (b)(1)(ii)(C) of this section apply with respect to the severance and funding of the severed trusts.

(4) *Allocation of exemption*—(i) *In general*. With respect to a separate share treated as a separate trust under paragraph (a)(1) or (2) of this section, an individual's GST exemption is allocated to the separate trust. See §26.2632–1 for rules concerning the allocation of GST exemption.

(ii) *Automatic allocation to direct skips*. If the transfer is a direct skip to a trust that occurs during the transferor's lifetime and is treated as a transfer to separate trusts under paragraphs (a)(1) or (a)(2) of this section, the transferor's GST exemption not previously allocated is automatically allocated on a pro rata basis among the separate trusts. The transferor may prevent an automatic allocation of GST exemption to a separate share of a single trust by describing on a timely-filed United States Gift (and Generation-Skipping Transfer) Tax Return (Form 709) the transfer and the extent to which the automatic allocation is not to apply to a particular share. See §26.2632–1(b) for rules for avoiding the automatic allocation of GST exemption.

(5) *Examples*. The following examples illustrate the principles of this section (a):

Example 1. Separate shares as separate trusts. T transfers $100,000 to a trust under which income is to be paid in equal shares for 10 years to T's child, C, and T's grandchild, GC (or their respective estates). The trust does not permit distributions of principal during the term of the trust. At the end of the 10-year term, the trust principal is to be distributed to C and GC in equal shares. The shares of C and GC in the trust are separate and independent and, therefore, are treated as separate trusts. The result would not be the same if the trust permitted distributions of principal unless the distributions could only be made from a one-half separate share of the initial trust principal and the distributee's future rights with respect to the trust are correspondingly reduced. T may allocate part of T's GST exemption under section 2632(a) to the share held for the benefit of GC.

Example 2. Separate share rule inapplicable. The facts are the same as in *Example 1*, except the trustee holds the discretionary power to distribute the income in any proportion between C and GC during the last year of the trust. The shares of C and GC in the trust are not separate and independent shares throughout the entire term of the trust and, therefore, are not treated as separate trusts for purposes of chapter 13.

Example 3. Pecuniary payment as separate share. T creates a lifetime revocable trust providing that on T's death $500,000 is payable to T's spouse, S, with the balance of the principal to be held for the benefit of T's grandchildren. The value of the trust is includible in T's gross estate upon T's death. Under the terms of the trust, the payment to S is required to be made in cash, and under local law S is entitled to receive interest on the payment at an annual rate of 6 percent, commencing immediately upon T's death. For purposes of chapter 13, the trust is treated as created at T's death, and the $500,000 payable to S from the trust is treated as a separate share. The result would be the same if the payment to S could be satisfied using noncash assets at their value on the date of distribution. Further, the result would be the same if the decedent's probate estate poured over to the revocable trust on the decedent's death and was then distributed in accordance with the terms of the trust.

Example 4. Pecuniary payment not treated as separate share. The facts are the same as in *Example 3*, except the bequest to S is to be paid in noncash assets valued at their values as finally determined for Federal estate tax purposes. Neither the trust instrument nor local law requires that the assets distributed in satisfaction of the bequest fairly reflect net appreciation or depreciation in all the assets from which the bequest may be funded. S's $500,000 bequest is not treated as a separate share and the trust is treated as a single trust for purposes of chapter 13.

Example 5. Multiple transferors to single trust. A transfers $100,000 to an irrevocable generation-skipping trust; B simultaneously transfers $50,000 to the same trust. As of the time of the transfers, the single trust is treated as two trusts for purposes of chapter 13. Because A contributed ⅔ of the value of the initial corpus, ⅔ of the single trust principal is treated as a separate trust created by A. Similarly, because B contributed ⅓ of the value of the initial corpus, ⅓ of the single trust is treated as a separate trust created by B. A or B may allocate their GST exemption under section 2632(a) to the respective separate trusts.

Example 6. Additional contributions. A transfers $100,000 to an irrevocable generation-skipping trust; B simultaneously transfers $50,000 to the same trust. When the value of the single trust has increased to $180,000, A contributes an additional $60,000 to the trust. At the time of the additional contribution, the portion of the single trust attributable to each grantor's separate trust must be redetermined. The portion of the single trust attributable to A's separate trust immediately after the contribution is ¾ ((⅔ × $180,000) + $60,000)/$240,000). The portion attributable to B's separate trust after A's addition is ¼.

Example 7. Distributions from a separate share. The facts are the same as in *Example 6*, except that, after A's second contribution, $50,000 is distributed to a beneficiary of the trust. Absent a provision in the trust instrument that charges the distribution against the contribution of either A or B, ¾ of the distribution is treated as made from the separate trust of which A is the transferor and ¼ from the separate trust of which B is the transferor.

Example 8. Separate share rule inapplicable. T creates an irrevocable trust that provides the trustee with the discretionary power to distribute income or corpus to T's children and grandchildren. The trust provides that, when T's youngest child reaches age 21, the trust will be divided into separate shares, one share for each child of T. The income from a respective child's share will be paid to the child during the child's life with the remainder passing to such child's children (grandchildren of T). The separate shares that come into existence when the youngest child reaches age 21 will not be recognized as separate trusts for purposes of Chapter 13 because the shares did not exist from and at all times after the creation of the trust. Any allocation of GST exemption to the trust either before or after T's youngest child reaches age 21 will apply with respect to the entire trust. Thus, the inclusion ratio will be the same with respect to any distribution from the trust or the separate shares. The result would be the same if, the trust instrument provided that the trust was to be divided into separate trusts when T's youngest child reached age 21.

(b) *Division of a trust included in the gross estate*—(1) *In general*. The severance of a trust that is included in the transferor's gross estate (or created under the transferor's will) into two or more trusts is recognized for purposes of chapter 13 if—

(i) The trust is severed pursuant to a direction in the governing instrument providing that the trust is to be divided upon the death of the transferor; or

(ii) The governing instrument does not require or otherwise direct severance but the trust is severed pursuant to discretionary authority granted either under the governing instrument or under local law; and

(A) The terms of each of the new trusts provide for the same succession of interests and beneficiaries as are provided in the original trust;

(B) The severance occurs (or a reformation proceeding, if required, is commenced) prior to the date prescribed for filing the Federal estate tax return (including extensions actually granted) for the estate of the transferor; and

(C) Either—

(*1*) The new trusts are severed on a fractional basis. If severed on a fractional basis, the separate trusts need not be funded with a pro rata portion of each asset held by the undivided trust. The trusts may be funded on a nonpro rata basis provided funding is based on either the fair market value of the assets on the date of funding or in a manner that fairly reflects the net appreciation or depreciation in the value of the assets measured from the date of death to the date of funding; or

(*2*) If the severance is required (by the terms of the governing instrument) to be made on the basis of a pecuniary amount, the pecuniary payment is satisfied in a manner that would meet the requirements of paragraph (a)(1)(ii) of this section if it were paid to an individual.

(2) *Special rule*. If a court order severing the trust has not been issued at the time the Federal estate tax return is filed, the executor must indicate on a statement attached to the return that a proceeding has been commenced to sever the trust and describe the manner in which the trust is proposed to be severed. A copy of the petition or other instrument used to commence the proceeding must also be attached to the return. If the governing instrument of a trust or local law authorizes the severance of the trust, a severance pursuant to that authorization is treated as meeting the requirement of paragraph (b)(1)(ii)(B) of this section if the executor indicates on the Federal estate tax return that separate trusts will be created (or funded) and clearly sets forth the manner in which the trust is to be severed and the separate trusts funded.

(3) *Allocation of exemption*. An individual's GST exemption under §2632 may be allocated to the separate trusts created pursuant to this section at the discretion of the executor or trustee.

(4) *Examples*. The following examples illustrate the provisions of this section (b):

Example 1. Severance of single trust. T's will establishes a testamentary trust providing that income is to be paid to T's spouse for life. At the spouse's death, one-half of the corpus is to be paid to T's child, C, or C's estate (if C fails to survive the spouse) and one-half of the corpus is to be paid to T's grandchild, GC, or GC's estate (if GC fails to survive the spouse). If the requirements of paragraph (b) of this section are otherwise satisfied, T's executor may divide the testamentary trust equally into two separate trusts, one trust providing an income interest to spouse for life with remainder to C, and the other trust with an income interest to spouse for life with remainder to GC. Furthermore, if the requirements of paragraph (b) of this section are satisfied, the executor or trustee may further divide the trust for the benefit of GC. GST exemption may be allocated to any of the divided trusts.

Example 2. Severance of revocable trust. T creates an inter vivos revocable trust providing that, at T's death and after payment of all taxes and administration expenses, the remaining corpus will be divided into two trusts. One trust, for the benefit of T's spouse, is to be funded with the smallest amount that, if qualifying for the marital deduction, will reduce the estate tax to zero. The other trust, for the benefit of T's descendants, is to be funded with the balance of the revocable trust corpus. The trust corpus is includible in T's gross estate. Each trust is recognized as a separate trust for purposes of chapter 13.

26.2662–1 Generation-skipping transfer tax return requirements.

(a) *In general*. Chapter 13 imposes a tax on generation-skipping transfers (as defined in section 2611). The requirements relating to the return of tax depend on the type of generation-skipping transfer involved. This section contains rules for filing the required tax return. Paragraph (c)(2) of this section provides special rules concerning the return requirements for generation-skipping transfers pursuant to certain trust arrangements (as defined in paragraph (c)(2)(ii) of this section), such as life insurance policies and annuities.

(b) *Form of return*—(1) *Taxable distributions*. Form 706GS(D) must be filed in accordance with its instructions for any taxable distribution (as defined in section 2612(b)). The trust involved in a transfer described in the preceding sentence must file Form 706GS(D–1) in accordance with its instructions. A copy of Form 706GS(D–1) shall be sent to each distributee.

(2) *Taxable terminations*. Form 706GS(T) must be filed in accordance with its instructions for any taxable termination (as defined in section 2612(a)).

(3) *Direct skip*—(i) *Inter vivos direct skips*. Form 709 must be filed in accordance with its instructions for any direct skip (as defined in section 2612(c)) that is subject to chapter 12 and occurs during the life of the transferor.

(ii) *Direct skips occurring at death*—(A) *In general*. Form 706 or Form 706NA must be filed in accordance with its instructions for any direct skips (as defined in section 2612(c)) that are subject to chapter 11 and occur at the death of the decedent.

(B) *Direct skips payable from a trust*. Schedule R–1 of Form 706 must be filed in accordance with its instructions for any direct skip from a trust if such direct skip is subject to chapter 11. See paragraph (c)(2) of this section for special rules relating to the person liable for tax and required to make the return under certain circumstances.

(c) *Person liable for tax and required to make return*—(1) *In general*. Except as otherwise provided in this section, the following person is liable for the tax imposed by section 2601 and must make the required tax return—

(i) The transferee in a taxable distribution (as defined in section 2612(b));

(ii) The trustee in the case of a taxable termination (as defined in section 2612(a));

(iii) The transferor (as defined in section 2652(a)(1)(B)) in the case of an inter vivos direct skip (as defined in section 2612(c));

(iv) The trustee in the case of a direct skip from a trust or with respect to property that continues to be held in trust; or

(v) The executor in the case of a direct skip (other than a direct skip described in paragraph (c)(1)(iv) of this section) if the transfer is subject to chapter 11. See paragraph (c)(2) of this section for special rules relating to direct skips to or from certain trust arrangements (as defined in paragraph (c)(2)(ii) of this section).

(2) *Special rule for direct skips occurring at death with respect to property held in trust arrangements*—(i) *In general*. In the case of certain property held in a trust arrangement (as defined in paragraph (c)(2)(ii) of this section) at the date of death of the transferor, the person who is required to make the return and who is liable for the tax imposed by chapter 13 is determined under paragraphs (c)(2)(iii) and (iv) of this section.

(ii) *Trust arrangement defined*. For purposes of this section, the term *trust arrangement* includes any arrangement (other than an estate) which, although not an explicit trust, has the same effect as an explicit trust. For purposes of this section, the term ''explicit trust'' means a trust described in §301.7701–4(a).

(iii) *Executor's liability in the case of transfers with respect to decedents dying on or after June 24, 1996, if the transfer is less than $250,000*. In the case of a direct skip occurring at death, the executor of the decedent's estate is liable for the tax imposed on that direct skip by chapter 13 and is required to file Form 706 or Form 706NA (and not Schedule R–1 of Form 706) if, at the date of the decedent's death—

(A) The property involved in the direct skip is held in a trust arrangement; and

(B) The total value of the property involved in direct skips with respect to the trustee of that trust arrangement is less than $250,000.

(iv) *Executor's liability in the case of transfers with respect to decedents dying prior to June 24, 1996*, if the transfer is less than $100,000. In the case of a direct skip occurring at death with respect to a decedent dying prior to June 24, 1996, the rule in paragraph (c)(2)(iii) of this section that imposes liability upon the executor applies only if the property involved in the direct skip with respect to the trustee of the trust arrangement, in the aggregate, is less than $100,000.

(v) *Executor's right of recovery*. In cases where the rules of paragraphs (c)(2)(iii) and (iv) of this section impose liability for the generation-skipping transfer tax on the executor, the executor is entitled to recover from the trustee (if the property continues to be held in trust) or from the recipient of the property (in the case of a transfer from a trust), the generation-skipping transfer tax attributable to the transfer.

(vi) *Examples*. The following examples illustrate the application of this paragraph (c)(2) with respect to decedents dying on or after June 24, 1996:

Example 1. Insurance proceeds less than $250,000. On August 1, 1997, T, the insured under an insurance policy, died. The proceeds ($200,000) were includible in T's gross estate for Federal estate tax purposes. T's grandchild GC, was named the sole beneficiary of the policy. The insurance policy is treated as a trust under section 2652(b)(1), and the payment of the proceeds to GC is a transfer from a trust for purposes of chapter 13. Therefore, the payment of the proceeds to GC is a direct skip. Since the proceeds from the policy ($200,000) are less than $250,000, the executor is liable for the tax imposed by chapter 13 and is required to file Form 706.

Example 2. Aggregate insurance proceeds of $250,000 or more. Assume the same facts as in *Example 1*, except T is the insured under two insurance policies issued by the same insurance company. The proceeds ($150,000) from each policy are includible in T's gross estate for Federal estate tax purposes. T's grandchild, GC1, was named the sole beneficiary of Policy 1, and T's other grandchild, GC2, was named the sole beneficiary of Policy 2. GC1 and GC2 are skip persons (as defined in section 2613). Therefore, the payments of the proceeds are direct skips. Since the total value of the policies ($300,000) exceeds $250,000, the insurance company is liable for the tax imposed by chapter 13 and is required to file Schedule R–1 of Form 706.

Example 3. Insurance proceeds of $250,000 or more held by insurance company. On August 1, 1997, T, the insured under an insurance policy, dies. The policy provides that the insurance company shall make monthly payments of $750 to GC, T's grandchild, for life with the remainder payable to T's great grandchild, GGC. The face value of the policy is $300,000. Since the proceeds continue to be held by the insurance company (the trustee), the proceeds are treated as if they were transferred to a trust for purposes of chapter 13. The trust is a skip person (as defined in section 2613(a)(2)) and the transfer is a direct skip. Since the total value of the policy ($300,000) exceeds $250,000, the insurance company is liable for the tax imposed by chapter 13 and is required to file Schedule R–1 of Form 706.

Example 4. Insurance proceeds less than $250,000 held by insurance company. Assume the same facts as in *Example 3*, except the policy provides that the insurance company shall make monthly payments of $500 to GC and that the face value of the policy is $200,000. The transfer is a transfer to a trust for purposes of chapter 13. However, since the total value of the policy ($200,000) is less than $250,000, the executor is liable for the tax imposed by chapter 13 and is required to file Form 706.

Example 5. On August 1, 1997, A, the insured under a life insurance policy, dies. The insurance proceeds on A's life that are payable under policies issued by Company X are in the aggregate amount of $200,000 and are includible in A's gross estate. Because the proceeds are includible in A's gross estate, the generation-skipping transfer that occurs upon A's death, if any, will be a direct skip rather than a taxable distribution or a taxable termination. Accordingly, because the aggregate amount of insurance proceeds with respect to Company X is less than $250,000, Company X may pay the proceeds without regard to whether the beneficiary is a skip person in relation to the decedent-transferor.

(3) *Limitation on personal liability of trustee*. Except as provided in paragraph (c)(3)(iii) of this section, a trustee is not personally liable for any increases in the tax imposed by section 2601 which is attributable to the fact that—

(i) A transfer is made to the trust during the life of the transferor for which a gift tax return is not filed; or

(ii) The inclusion ratio with respect to the trust, determined by reference to the transferor's gift tax return, is erroneous, the actual inclusion ratio being greater than the reported inclusion ratio.

(iii) This paragraph (c)(3) does not apply if the trustee has or is deemed to have knowledge of facts sufficient to reasonably conclude that a gift tax return was required to be filed or that the inclusion ratio is erroneous. A trustee is deemed to have knowledge of such facts if the trustee's agent, employee, partner, or co-trustee has knowledge of such facts.

(4) *Exceptions*—(i) *Legal or mental incapacity*. If a distributee is legally or mentally incapable of making a return, the return may be made for the distributee by the distributee's guardian or, if no guardian has been appointed, by a person charged with the care of the distributee's person or property.

(ii) *Returns made by fiduciaries*. See section 6012(b) for a fiduciary's responsibilities regarding the returns of decedents, returns of persons under a disability, returns of estates and trusts, and returns made by joint fiduciaries.

(d) *Time and manner of filing return*—(1) *In general*. Forms 706, 706NA, 706GS(D), 706GS(D–1), 706GS(T), 709, and Schedule R–1 of Form 706 must be filed with the Internal Revenue Service office with which an estate or gift tax return of the transferor must be filed. The return shall be filed—

(i) *Direct skip*. In the case of a direct skip, on or before the date on which an estate or gift tax return is required to be filed with respect to the transfer (see section 6075(b)(3)); and

(ii) *Other transfers*. In all other cases, on or before the 15th day of the 4th month after the close of the calendar year in which such transfer occurs. See paragraph (d)(2) of this section for an exception to this rule when an election is made under section 2624(c) to value property included in certain taxable terminations in accordance with section 2032.

(2) *Exception for alternative valuation of taxable termination*. In the case of a taxable termination with respect to which an election is made under section 2624(c) to value property in accordance with section 2032, a Form 706GS(T) must be filed on or before the 15th day of the 4th month after the close of the calendar year in which the taxable termination occurred, or on or before the 10th month following the month in which the death that resulted in the taxable termination occurred, whichever is later.

(e) *Place for filing returns*. See section 6091 for the place for filing any return, declaration, statement, or other document, or copies thereof, required by chapter 13.

(f) *Lien on property*. The liens imposed under sections 6324, 6324A, and 6324B are applicable with respect to the tax imposed under chapter 13. Thus, a lien under section 6324 is imposed in the amount of the tax imposed by section 2601 on all property transferred in a generation-skipping transfer until the tax is fully paid or becomes uncollectible by reason of lapse of time. The lien attaches at the time of the generation-skipping transfer and is in addition to the lien for taxes under section 6321.

§26.2663–1 Recapture tax under section 2032A.

See §26.2642–4(a)(4) for rules relating to the recomputation of the applicable fraction and the imposition of additional GST tax, if additional estate tax is imposed under section 2032A.

§26.2663–2 Application of chapter 13 to transfers by nonresidents not citizens of the United States.

(a) *In general*. This section provides rules for applying chapter 13 of the Internal Revenue Code to transfers by a transferor who is a nonresident not a citizen of the United States (NRA transferor). For purposes of this section, an individual is a resident or citizen of the United States if that individual is a resident or citizen of the United States under the rules of chapter 11 or 12 of the Internal Revenue Code, as the case may be. Every NRA transferor is allowed a GST exemption of $1,000,000. See §26.2632–1 regarding the allocation of the exemption.

(b) *Transfers subject to chapter 13*—(1) *Direct skips*. A transfer by a NRA transferor is a direct skip subject to chapter 13 only to the extent that the transfer is subject to the Federal estate or gift tax within the meaning of §26.2652–1(a)(2). See §26.2612–1(a) for the definition of *direct skip*.

(2) *Taxable distributions and taxable terminations*. Chapter 13 applies to a taxable distribution or a taxable termination to the extent that the initial transfer of property to the trust by a NRA transferor, whether during life or at death, was subject to the Federal estate or gift tax within the meaning of §26.2652–1(a)(2). See §26.2612–1(b) for the definition of a *taxable termination* and §26.2612–1(c) for the definition of a *taxable distribution*.

(c) *Trusts funded in part with property subject to chapter 13 and in part with property not subject to chapter*

13—(1) *In general*. If a single trust created by a NRA transferor is in part subject to chapter 13 under the rules of paragraph (b) of this section and in part not subject to chapter 13, the applicable fraction with respect to the trust is determined as of the date of the transfer, except as provided in paragraph (c)(3) of this section.

(i) *Numerator of applicable fraction*. The numerator of the applicable fraction is the sum of the amount of GST exemption allocated to the trust (if any) plus the value of the nontax portion of the trust.

(ii) *Denominator of applicable fraction*. The denominator of the applicable fraction is the value of the property transferred to the trust reduced as provided in §26.2642–1(c).

(2) *Nontax portion of the trust*. The nontax portion of a trust is a fraction, the numerator of which is the value of property not subject to chapter 13 determined as of the date of the initial completed transfer to the trust, and the denominator of which is the value of the entire trust. For example, T, a NRA transferor, transfers property that has a value of $1,000 to a generation-skipping trust. Of the property transferred to the trust, property having a value of $200 is subject to chapter 13 and property having a value of $800 is not subject to chapter 13. The nontax portion is .8 ($800 (the value of the property not subject to chapter 13) over $1,000 (the total value of the property transferred to the trust).

(3) *Special rule with respect to the estate tax inclusion period*. For purposes of this section, the provisions of §26.2632–1(c), providing rules applicable in the case of an estate tax inclusion period (ETIP), apply only if the property transferred by the NRA transferor is subsequently included in the transferor's gross estate. If the property is not subsequently included in the gross estate, then the nontax portion of the trust and the applicable fraction are determined as of the date of the initial transfer. If the property is subsequently included in the gross estate, then the nontax portion and the applicable fraction are determined as of the date of death.

(d) *Examples*. The following examples illustrate the provisions of this section. In each example T, a NRA, is the transferor; C is T's child; and GC is C's child and a grandchild of T:

Example 1. Direct transfer to skip person. T transfers property to GC in a transfer that is subject to Federal gift tax under chapter 12 within the meaning of §26.2652–1(a)(2). At the time of the transfer, C and GC are NRAs. T's transfer is subject to chapter 13 because the transfer is subject to gift tax under chapter 12.

Example 2. Transfers of both U.S. and foreign situs property. (i) T's will established a testamentary trust for the benefit of C and GC. The trust was funded with stock in a publicly traded U.S. corporation having a value on the date of T's death of $100,000, and property not situated in the United States (and therefore not subject to estate tax) having a value on the date of T's death of $400,000.

(ii) On a timely filed estate tax return (Form 706NA), the executor of T's estate allocates $50,000 of GST exemption under section 2632(a) to the trust. The numerator of the applicable fraction is $450,000, the sum of $50,000 (the amount of exemption allocated to the trust) plus $400,000 (the value of the nontax portion of the trust (4/5 × $500,000)). The denominator is $500,000. Hence, the applicable fraction with respect to the trust is .9 ($450,000/$500,000), and the inclusion ratio is .1 (1 – 9/10).

Example 3. Inter vivos transfer of U.S. and foreign situs property to a trust and a timely allocation of GST exemption. T establishes a trust providing that trust income is payable to T's child for life and the remainder is to be paid to T's grandchild. T transfers property to the trust that has a value of $100,000 and is subject to chapter 13. T also transfers property to the trust that has a value of $300,000 but is not subject to chapter 13. T allocates $100,000 of exemption to the trust on a timely filed United States Gift (and Generation-Skipping Transfer) Tax return (Form 709). The applicable fraction with respect to the trust is 1, determined as follows: $300,000 (the value of the nontax portion of the trust) plus $100,000 (the exemption allocated to the trust)/$400,000 (the total value of the property transferred to the trust).

Example 4. Inter vivos transfer of U.S. and foreign situs property to a trust and a late allocation of GST exemption. (i) In 1996, T transfers $500,000 of property to an inter vivos trust the terms of which provide that income is payable to C, for life, with the remainder to GC. The property transferred to the trust consists of property subject to chapter 13 that has a value of $400,000 on the date of the transfer and property not subject to chapter 13 that has a value of $100,000. T does not allocate GST exemption to the trust. On the transfer date, the nontax portion of the trust is .2 ($100,000/$500,000) and the applicable fraction is also .2 determined as follows: $100,000 (the value of the nontax portion of the trust)/$500,000 (the value of the property transferred to the trust).

(ii) In 1999, when the value of the trust is $800,000, T allocates $100,000 of GST exemption to the trust. The applicable fraction of the trust must be recomputed. The numerator of the applicable fraction is $260,000 ($100,000 (the amount of GST exemption allocated to the trust)) plus $160,000 (the value of the nontax portion of the trust as of the date of allocation (.2 × $800,000)). The denominator of the applicable fraction is $800,000. Accordingly, the applicable fraction with respect to the trust after the allocation is .325 ($260,000/$800,000) and the inclusion ratio is .675 (1 – .325).

Example 5. Taxable termination. The facts are the same as in *Example 4* except that, in 2006, when the value of the property is $1,200,000, C dies and the trust corpus is distributed to GC. The termination is a taxable termination. If no further GST exemption has been allocated to the trust, the applicable fraction remains .325 and the inclusion ratio remains .675.

Example 6. Estate Tax Inclusion Period. (i) T transferred property to an inter vivos trust the terms of which provided T with an annuity payable for 10 years or until T's prior death. The annuity satisfies the definition of a qualified interest under section 2702(b). The trust also provided that, at the end of the trust term, the remainder will pass to GC or GC's estate. The property transferred to the trust consisted of property subject to chapter 13 that has a value of $100,000 and property not subject to chapter 13 that has a value of $400,000. T allocated $100,000 of GST exemption to the trust. If T dies within the 10 year period, the value of the trust principal will be subject to inclusion in T's gross estate to the extent provided in sections 2103 and 2104(b). Accordingly, the ETIP rule under paragraph (c)(3) of this section applies.

(ii) In year 6 of the trust term, T died. At T's death, the trust corpus had a value of $800,000, and $500,000 was includible in T's gross estate as provided in sections 2103 and 2104(b). Thus, $500,000 of the trust corpus is subject to chapter 13 and $300,000 is not subject to chapter 13. The $100,000 GST exemption allocation is effective as of T's date of death. Also, the nontax portion of the trust and the applicable fraction are determined as of T's date of death. In this case, the nontax portion of the trust is .375, determined as follows: $300,000 (the value of the trust not subject to chapter 13)/$800,000 (the value of the trust). The numerator of the applicable fraction is $400,000, determined as follows: $100,000 (GST exemption previously allocated to the trust) plus $300,000 (the value of the nontax portion of the trust). The denominator of the applicable fraction is $800,000. Thus, the applicable fraction with respect to the trust is .50, unless additional exemption is allocated to the trust by T's executor or the automatic allocation rules of §26.2632–1(d)(2) apply.

Example 7. The facts are the same as in *Example 6* except that T survives the termination date of T's retained annuity and the trust corpus is distributed to GC. Since the trust was not included in T's gross estate, the ETIP rules do not apply. Accordingly, the nontax portion of the trust and the applicable fraction are determined as of the date of the transfer to the trust. The nontax portion of the trust is .80 ($400,000/$500,000). The numerator of the applicable fraction is $500,000 determined as follows: $100,000 (GST exemption allocated to the trust) plus $400,000 (the value of the nontax portion of the trust). Accordingly, the applicable fraction is 1, and the inclusion ratio is zero.

(e) *Transitional rule for allocations for transfers made before December 27, 1995*. If a NRA made a GST (inter vivos or testamentary) after December 23, 1992, and before December 27, 1995, that is subject to chapter 13 (within the meaning of §26.2663–2), the NRA will be treated as having made a timely allocation of GST exemption to the transfer in a calendar year in the order prescribed in section 2632(c). Thus, a NRA's unused GST exemption will initially be treated as allocated to any direct skips made during the calendar year and then to any trusts with respect to which the NRA made transfers during the same calendar year and from which a taxable distribution or a taxable termination may occur. Allocations within the above categories are made in the order in which the transfers occur. Allocations among simultaneous transfers within the same category are made pursuant to the principles of section 2632(c)(2). This transitional allocation rule will not apply if the NRA transferor, or the executor of the NRA's estate, as the case may be, elected to have an automatic allocation of GST exemption not apply by describing on a timely-filed Form 709 for the year of the transfer, or a timely filed Form 706NA, the details of the transfer and the extent to which the allocation was not to apply.

PART 301—PROCEDURE AND ADMINISTRATION

Par. 2. The authority citation for part 301 continues to read in part as follows:

Authority: 26 U.S.C. 7805.* * *

Par. 3. Section 301.9100–7T is amended as follows:

a. Paragraph (a)(1) is amended in the table by removing both entries for ''1431(a)''.

b. Paragraph (a)(4)(i) is amended in the table by removing the entry ''1431(a)''.

c. Paragraph (a)(4)(iii) is revised to read as follows:

§301.9100–7T Time and manner of making certain elections under the Tax Reform Act of 1986.

(a) * * *

(4) * * *

(iii) *Freely revocable election.* The election described in this section under Act section 311(d)(2) is freely revocable.

* * * * * *

PART 602—OMB CONTROL NUMBERS UNDER THE PAPERWORK REDUCTION ACT

Par. 4. The authority citation for part 602 continues to read as follows:

Authority: 26 U.S.C. 7805.

Par. 5. In §602.101, paragraph (c) is amended by adding entries in numerical order in the table to read as follows:

§602.101 OMB Control numbers.

* * * * * *

(c) * * *

CFR part or section where identified and described	Current OMB control number
* * * * * *	
26.2601–1	1545–0985
* * * * * *	
26.2632–1	1545–0985
* * * * * *	
26.2642–1	1545–0985
26.2642–2	1545–0985
26.2642–3	1545–0985
26.2642–4	1545–0985
* * * * * *	
26.2652–2	1545–0985
* * * * * *	
26.2662–2	1545–0985
* * * * * *	

Michael P. Dolan,
Deputy Commissioner of Internal Revenue.

Approved December 14, 1995.

Leslie Samuels,
Assistant Secretary of the Treasury.

(Filed by the Office of the Federal Register on December 26, 1995, 8:45 a.m., and published in the issue of the Federal Register for December 27, 1995, 60 F.R. 66898)

Imaging Systems to Retain Books and Records

Notice 96–10

This notice provides a proposed revenue procedure that, when finalized, will provide guidance to taxpayers on the use of an imaging system to satisfy the requirement of § 6001 of the Internal Revenue Code to maintain books and records.

The Service is proposing this revenue procedure as one means of complying with the requirements of § 6001 using electronic technology for records storage. The Service welcomes public comments on the proposed revenue procedure. Comments should be submitted by March 28, 1996, to the Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044, Attn: CC:CORP:T:R (ITA Branch 4), Room 5228.

Rev. Proc. 96–#

SECTION 1. PURPOSE

This revenue procedure provides guidance to taxpayers on using an imaging system (as defined in section 3.01 of this revenue procedure) to maintain books and records. Records kept using an imaging system that complies with the requirements of this revenue procedure will constitute records within the meaning of § 6001 of the Internal Revenue Code.

SECTION 2. BACKGROUND

.01 Section 6001 provides that every person liable for any tax imposed by the Code, or for the collection thereof, must keep such records, render such statements, make such returns, and comply with such rules and regulations as the Secretary may from time to time prescribe. Whenever necessary, the Secretary may require any person, by notice served upon such person or by regulations, to make such returns, render such statements, or keep such records, as the Secretary deems sufficient to show whether or not such person is liable for tax.

.02 Section 1.6001–1(a) of the Income Tax Regulations provides that, except for farmers and wage-earners, any person subject to income tax or any person required to file a return of information with respect to income, must keep such books and records, including inventories, as are sufficient to establish the amount of gross income, deductions, credits, or other matters required to be shown by such person in any return of such tax or information.

.03 Section 1.6001–1(e) provides that the books or records required by § 6001 must be kept available at all times for inspection by authorized internal revenue officers or employees, and shall be retained so long as the contents thereof may become material in the administration of any internal revenue law.

SECTION 3. SCOPE

.01 This revenue procedure applies to all taxpayers that use an imaging system to maintain books and records. For purposes of this revenue procedure, an ''imaging system'' means an electronic technology used to prepare, record, image, index, store, preserve, retrieve, and reproduce books and records, the originals of which are in hardcopy format.

.02 A taxpayer's use of a service bureau or time-sharing service to provide the taxpayer with an imaging system for its books and records does not relieve the taxpayer of the responsibilities described in this revenue procedure.

.03 The requirements of this revenue procedure pertain to all matters under the jurisdiction of the Commissioner of Internal Revenue including, but not limited to, income, excise, employment, and estate and gift taxes, as well as employee plans and exempt organizations.

SECTION 4. IMAGING SYSTEM REQUIREMENTS

.01 *General Requirements of an Imaging System.*

(1) An imaging system for maintaining books and records for purposes of § 6001 must create accurate and complete electronic images of hardcopy documents, and must index, store, preserve, retrieve, and reproduce imaged documents.

(2) An imaging system must include:

(a) reasonable controls to ensure the integrity, accuracy, and reliability of the imaging system, including a record of where, when, by whom, and on what equipment the image was produced, including the hardware and software that was used;

(b) reasonable controls to prevent the unauthorized creation of, addition to, alteration of, deletion of, or deterioration of any imaged document (for instance, one control could be the use of a non-erasable and non-rewritable media);

(c) an inspection and quality assurance program evidenced by regular evaluations of the imaging system including periodic checks of imaged documents;

(d) a retrieval system that includes an indexing system (within the meaning of section 4.02 of this revenue procedure); and

(e) the ability to reproduce a legible and readable hardcopy (within the meaning of section 4.01(5) of this revenue procedure) of an imaged document.

(3) For each imaging system used, the taxpayer must establish, maintain, and retain written procedures that describe in detail the complete imaging system. Any changes to the imaging system must be documented in writing. These written procedures and all modifications must be readily available to the Service upon request.

(4) The imaging system must provide support for the taxpayer's books and records (including books and records in an automated data processing system). For example, the imaging system and the taxpayer's books and records must be cross-referenced, so that all imaged documents that support an entry in the taxpayer's books and records can be automatically identified and retrieved for viewing or printing.

(5) All images reproduced by the imaging system must exhibit a high degree of legibility and readability when displayed on a video display terminal or reproduced on paper. The term ''legibility'' means the observer must be able to identify all letters and numerals positively and quickly to the exclusion of all other letters or numerals. The term ''readability'' means

that the observer must be able to recognize a group of letters or numerals as words or complete numbers. The taxpayer must ensure that the reproduction process maintains the legibility and readability of the image being reproduced. Taxpayers may use reasonable data compression or formatting technologies as part of their imaging system so long as the requirements of this revenue procedure are satisfied.

(6) The taxpayer must retain imaged documents until their contents are no longer material to the administration of the Internal Revenue laws under § 1.6001–1(e).

(7) The taxpayer must be able to retrieve and reproduce imaged documents at the time of a Service examination. Reproduction includes the ability to print a legible and readable hardcopy of any imaged document.

(8) The taxpayer must provide the Service, at the time of an examination, or for the tests described in section 5 of this revenue procedure, with the resources (*e.g.*, appropriate hardware and software, personnel, documentation, etc.) necessary for promptly locating, retrieving, reading, and reproducing on paper any imaged document.

(9) The taxpayer may use more than one imaging system. In that event, each system must meet the requirements of this revenue procedure. Imaged documents that are contained in a system with respect to which the taxpayer ceases to maintain the hardware and the software necessary to satisfy the conditions of this revenue procedure will be deemed destroyed by the taxpayer unless the existing imaged documents are converted to a format compatible with an imaging system that the taxpayer continues to maintain.

(10) An imaging system must not be subject, in whole or in part, to any agreement (such as a contract or license) that would limit or restrict the Service's access to and use of the imaging system on the taxpayer's premises (or such other place where the imaging system is maintained), including personnel, hardware, software, files, indexes and software documentation.

.02 *Requirements of an Indexing System*.

(1) For purposes of this revenue procedure, an indexing system is a system that permits the rapid identification and retrieval for viewing or reproducing of relevant documents maintained in an imaging system. For example, an indexing system might consist of assigning each imaged document a unique identification number and maintaining a separate database that contains descriptions of each imaged document along with that document's identification number. In addition, any system used to maintain, organize, or coordinate multiple imaging systems is treated as an indexing system under this revenue procedure. The requirement to maintain an indexing system will be satisfied if the indexing system is functionally comparable to a reasonable hardcopy filing system. The requirement to maintain an indexing system does not require that a separate imaged document description database be maintained if comparable results can be achieved without a separate description database.

(2) Reasonable controls must be undertaken to protect the indexing system against the unauthorized creation of, addition to, alteration of, deletion of, or deterioration of any entries.

.03 *Recommended Practices*. The implementation of records management practices is a business decision that is solely within the discretion of the taxpayer. Records management practices may include the labeling of documents, providing a secure storage environment, creating back-up copies, selecting an off-site storage location, retaining hardcopies of illegible documents or documents that cannot be accurately or completely imaged or reproduced under the imaging system, and testing to confirm records integrity.

SECTION 5. DISTRICT DIRECTOR TESTING

.01 The District Director may periodically initiate tests of a taxpayer's imaging system. These tests may include an evaluation (by actual use) of a taxpayer's equipment and software, as well as the procedures used by a taxpayer to prepare, record, image, index, store, preserve, retrieve, and reproduce imaged documents. In some instances, the District Director may choose to review the internal controls, security procedures, and documentation associated with the taxpayer's imaging system.

.02 The tests described in section 5.01 of this revenue procedure are not an ''examination,'' ''investigation,'' or ''inspection'' of the books and records within the meaning of § 7605(b), or a prior audit for purposes of § 530 of the Revenue Act of 1978, 1978–3 (Vol.1) C.B. 119, because the evaluation is not directly related to the determination of the tax liability of a taxpayer for a particular taxable period.

.03 The District Director must inform the taxpayer of the results of any periodic tests.

SECTION 6. COMPLIANCE

.01 A taxpayer's imaging system that meets the requirements of this revenue procedure will be treated as being in compliance with the recordkeeping requirements of § 6001 and the regulations thereunder.

.02 A taxpayer's imaging system that fails to meet the requirements of this revenue procedure may be treated as not being in compliance with the recordkeeping requirements of § 6001 and the regulations thereunder. See section 8 for applicable penalties. However, even though a taxpayer's imaging system fails to meet the requirements of this revenue procedure, the penalties described in section 8 may not apply if the taxpayer maintains its original books and records, or maintains its books and records in micrographic form in conformity with Rev. Proc. 81–46, 1981–2 C.B. 621.

SECTION 7. DESTRUCTION OF HARDCOPY DOCUMENTS

This revenue procedure permits the destruction of hardcopy documents after the taxpayer:

(1) has completed its own testing of the imaging system that establishes that hardcopy documents are being imaged in compliance with all the provisions of this revenue procedure; and

(2) has instituted procedures that ensure its continued compliance with all the provisions of this revenue procedure.

SECTION 8. PENALTIES

The District Director may issue a Notice of Inadequate Records pursuant to § 1.6001–1(d) if the taxpayer's books and records are available only as imaged documents and the taxpayer's imaging system fails to meet the requirements of this revenue procedure. Taxpayers whose imaging systems fail to meet the requirements of this revenue procedure may also be subject to applicable penalties under subtitle F of the Code including the § 6662(a) accuracy-related civil penalty and the § 7203 willful failure criminal penalty.

DRAFTING INFORMATION

The principal author of this notice is Celia Gabrysh of the Office of the Assistant Chief Counsel (Income Tax and Accounting). For further information regarding this notice, contact Ms. Gabrysh on (202) 622-4940 (not a toll-free call).

Delegation Order No. 232 (Rev. 2)

Delegation of Authority

AGENCY: Internal Revenue Service (IRS), Treasury

ACTION: Delegation of authority to rescind TAOs.

SUMMARY: The Commissioner, Internal Revenue Service is issuing this Delegation Order to limit the modification or rescission of Taxpayer Assistance Orders (''TAO'') to the Commissioner, Deputy Commissioner or Taxpayer Ombudsman. The Ombudsman's Delegation Order 232 (Rev. 1) providing more expansive rescission authority is hereby superseded.

EFFECTIVE DATE: January 5, 1996.

FOR FURTHER INFORMATION CONTACT: Doug Peterson, C:PRP, Room 1027, 1111 Constitution Avenue, NW., Washington, DC 20224, 202-622-4315 (not a toll-free call).

Authority to Modify or Rescind Taxpayer Assistance Orders (TAO)

Section 7811 of the Code states that TAOs ''may be modified or rescinded only by the Ombudsman, a district director, a service center director, a compliance center director, a regional director of appeals, or any superior of any such person.'' The Commissioner wishes to reassure taxpayers that TAOs will be accorded the greatest respect and consideration by the IRS. This delegation order accordingly limits the discretionary modification or rescission authority under §7811 to only the Commissioner, Deputy Commissioner or Taxpayer Ombudsman.

This delegation order supersedes Ombudsman's Del. Order 232 (Rev. 1) which provided more expansive authority to local IRS officials.

Dated: January 5, 1996.

Margaret M. Richardson,
Commissioner.

(Filed by the Office of the Federal Register on Januare 9, 1996, 8:45 a.m., and published in the issue of the Federal Register for January 10, 1996, 61 F.R. 764)

Delegation Order No. 239 (Rev. 1)

Delegation of authority

AGENCY: Internal Revenue Service (IRS), Treasury

ACTION: Delegation of authority.

SUMMARY: The Commissioner, Internal Revenue Service, amends Delegation Order 239 to clarify that the Taxpayer Ombudsman is delegated the authority to issue Taxpayer Assistance Orders (''TAO'') to intervene on behalf of taxpayers and take positive action with respect to taxpayer cases.

The Commissioner further amends Delegation Order 239 to direct the Ombudsman to prepare an annual report of the most serious problems taxpayers face when conducting business with the IRS and to suggest administrative and legislative solutions to these problems, if applicable.

Finally, Delegation Order 239 is further amended to give the Ombudsman the authority to establish a system to track the response of IRS officials to the administrative problems identified in the Ombudsman's annual report.

EFFECTIVE DATE: January 5, 1996.

FOR FURTHER INFORMATION CONTACT: Doug Peterson, C:PRP, Room 1027, 1111 Constitution Avenue, NW., Washington, DC 20224, 202-622-4315 (not a toll-free call).

Amendment of Delegation Order 239

The Commissioner in Delegation Order 239 delegated to the Taxpayer Ombudsman the authority to issue TAOs in addition to the situations specified in section 7811 of the Internal Revenue Code. The Commissioner wishes to amend Delegation Order 239 to clarify that such authority gives the Taxpayer Ombudsman the ability to intervene on behalf of taxpayers to take positive action with respect to taxpayers' cases. Thus, for example, the Ombudsman may issue a TAO to speed a refund to a taxpayer to relieve severe financial hardship on the part of the taxpayer. Likewise, the Ombudsman may issue a TAO to stay an enforcement action to ensure review of whether such action is appropriate.

The Commissioner also amends Delegation Order 239 to direct the Ombudsman to prepare an annual report of the most serious problems taxpayers face when conducting business with the Service and to suggest administrative and legislative solutions to these problems, if applicable. The purpose of the annual report is to provide an independent mechanism to identify and resolve the problems taxpayers may encounter with the Service.

The Commissioner also hereby delegates to the Ombudsman the authority to establish a system to track the Service's response to administrative changes suggested in the Ombudsman's report. The tracking system should identify which IRS official ideally should respond to the suggestion and how that official responded. Additionally, the Ombudsman's annual report should include a section detailing this information concerning the Service's response to any administrative changes suggested in the prior year's report.

Dated: January 5, 1996.

Margaret M. Richardson,
Commissioner.

(Filed by the Office of the Federal Register on January 9, 1996, 8:45 a.m., and published in the issue of the Federal Register for January 10 1996, 61 F.R. 763)

Part IV. Items of General Interest

Notice of Proposed Rulemaking and Notice of Public Hearing

Distribution of Marketable Securities by a Partnership

PS–2–95

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking and notice of public hearing.

SUMMARY: This document contains proposed regulations relating to the treatment of a distribution of marketable securities by a partnership under section 731(c) of the Internal Revenue Code of 1986, as amended (Code). These proposed regulations provide taxpayers with guidance needed to comply with certain changes made by the Uruguay Round Agreements Act of 1994. This document also provides notice of a public hearing on these proposed regulations.

DATES: Written comments and requests to speak (with outlines of oral comments) at a public hearing scheduled for 10 a.m. on Wednesday, April 3, 1996 must be received by Wednesday, March 13, 1996.

ADDRESSES: Send submissions to: CC:DOM:CORP:R (PS–2–95), Room 5228, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC 20044. In the alternative, submissions may be hand delivered between the hours of 8 a.m. and 5 p.m. to: CC:DOM:CORP:R (PS–2–95), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue NW., Washington, DC. The public hearing will be held in the IRS Auditorium.

FOR FURTHER INFORMATION CONTACT: Concerning the regulations, Terri A. Belanger or William M. Kostak, (202) 622-3080; concerning submissions and the hearing, Christina Vasquez, (202) 622-7190 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Introduction

This document proposes to add §1.731–2 to the Income Tax Regulations (26 CFR part 1) under section 731(c) of the Code. Section 731(c) was amended by section 741(a) of the Uruguay Round Agreements Act of 1994 (Public Law 103–465).

Background

Section 731(a)(1) of the Code provides that a partner must recognize gain on a distribution from a partnership to the extent that any money distributed exceeds the adjusted basis of the partner's interest in the partnership immediately before the distribution. Section 737 provides that a partner must recognize gain on a distribution of property other than money in an amount equal to the lesser of (i) the partner's net precontribution gain or (ii) the excess of the fair market value of the distributed property over the partner's basis in the partnership interest.

Section 731(c) provides that the term *money* includes marketable securities for purposes of section 731(a)(1) and section 737. As discussed in the legislative history accompanying section 731(c), treating marketable securities as money for this purpose is appropriate because marketable securities are economically equivalent to money. Section 731(c) affects only the tax consequences to the distributee partner; section 731(c) does not require the partnership or any partner other than the distributee partner to recognize gain on a distribution of marketable securities.

Explanation of Provisions

Marketable securities treated as money

Distributions of marketable securities are treated as distributions of money under section 731(c) only for purposes of sections 731(a)(1) and 737. For example, a distribution of marketable securities is not treated as a distribution of money to the extent it is subject to section 707 or section 751(b) because the distribution is not subject to section 731(a)(1) or section 737. In addition, marketable securities are not treated as money for purposes of section 731(a)(2), so that a partner does not recognize a loss on a distribution of marketable securities. Finally, marketable securities contributed by a partner are treated as property other than money for purposes of determining the partner's net precontribution gain under section 737(b).

Reduction of amount treated as money

Under section 731(c)(3)(B), the amount of marketable securities that is treated as money is reduced by the excess of (i) the partner's share of the net gain of the partnership's securities of the same class and issuer as the distributed securities immediately before the distribution over (ii) the partner's share of such net gain immediately after the distribution. This provision allows a partner to withdraw the partner's share of appreciation in the partnership's marketable securities without recognizing gain on the distribution. As a result, section 731(c) generally applies only when a partner receives a distribution of marketable securities in exchange for the partner's share of appreciated assets other than marketable securities.

Under the authority of section 731(c)(3)(B), the proposed regulations provide that all marketable securities held by a partnership are treated as marketable securities of the same class and issuer as the distributed securities. Treating all marketable securities as a single asset for this purpose is consistent with the basic rationale of section 731(c) that marketable securities are the economic equivalent of money. As a result, the amount of the distribution that is not treated as money will depend on the partner's share of the net appreciation in all partnership securities, not on the partner's share of the appreciation in the type of securities distributed.

Definition of marketable securities

In general, the term *marketable securities* includes any financial instruments—such as stocks, options, and derivatives-that are actively traded within the meaning of section 1092(d)(1). In addition, section 731(c)(2)(B)(v) provides that an interest in an entity is a marketable security if substantially all of the assets of the entity consist of marketable securities or money. The proposed regulations provide that substantially all of the assets of an entity consist of marketable securities or money only if 90 percent or more of the assets of the entity at the time of the distribution consist of such assets.

Section 731(c)(2)(B)(vi) provides that, to the extent provided in regulations, an interest in an entity not described in section 731(c)(2)(B)(v) is a marketable security to the extent that the value of such interest is attributable to marketable securities or money. The proposed regulations provide that an interest in an entity is a marketable security to the extent that the value of the interest is attributable to marketable securities or money that constitute less than 90 percent but 20 percent or more of the assets of the entity. The 20 percent threshold means that an interest in an entity holding only a small amount of marketable securities will not be treated as a marketable security.

The proposed regulations also provide that a marketable security will continue to be treated as a marketable security, even if the partnership or its partners are restricted by agreement or otherwise from selling or exchanging the security. This provision is intended to prevent a partnership from avoiding section 731(c) by temporarily restricting the transferability of the distributed security.

Exceptions

Consistent with the provisions of section 731(c)(3)(A), the proposed regulations provide three exceptions to section 731(c). First, the proposed regulations provide that if the marketable security was contributed to the partnership by the distributee partner, section 731(c) does not apply to the distribution of that security.

Second, the proposed regulations provide that section 731(c) does not apply to the distribution of a marketable security to the extent that the security was acquired by the partnership in a nonrecognition transaction in exchange for property other than marketable securities or cash and (i) the security is actively traded as of the date of distribution and (ii) the security is distributed by the partnership within five years of either the date the security was acquired by the partnership or, if later, the date the security became actively traded. For example, if a partnership contributed substantially all of its assets to a corporation in a transaction described in section 351 and the stock of the corporation became marketable, the distribution of the stock by the partnership within five years would not be subject to section 731(c). This exception recognizes that the marketable security in these situations is simply a substitute for the underlying assets exchanged in the nonrecognition transaction.

The proposed regulations also provide that section 731(c) does not apply to the distribution of a marketable security if (i) the security was not actively traded on the date acquired by the partnership and the entity to which the security relates had no outstanding actively traded securities at the time the security was acquired by the partnership; (ii) the security is actively traded as of the date of distribution; and (iii) the security was held by the partnership for at least six months before it became actively traded and the security was distributed by the partnership within five years of the date on which the security became actively traded.

In addition, the proposed regulations provide a successor security rule that applies to these exceptions. This rule provides that the exceptions continue to apply to a security acquired in a nonrecognition transaction in exchange for a security that was already subject to an exception.

Investment partnerships

Section 731(c) does not apply to the distribution of marketable securities by an investment partnership to an eligible partner. An investment partnership is defined as a partnership that has never been engaged in a trade or business and substantially all of the assets of which consist of the investment assets described in section 731(c)(3)(C)(i). The proposed regulations provide that a partner can qualify as an eligible partner even if the partner contributed services to the partnership. In addition, the proposed regulations provide that a partnership will not be treated as engaged in a trade or business if the partnership provides reasonable and customary management services to a lower-tier investment partnership. This exception allows an upper-tier investment partnership to manage the investments and other activities of a lower-tier investment partnership without disqualifying the upper-tier partnership as an investment partnership. The exception does not extend to management services provided to lower-tier partnerships other than investment partnerships because, as discussed below, the tiering rules of section 731(c)(3)(C)(iv) treat the upper-tier management partnership as engaged in the trade or business of the lower-tier partnership, thereby preventing the upper-tier partnership from qualifying as an investment partnership.

The proposed regulations also provide that a partnership will not be treated as engaged in a trade or business if the partnership provides reasonable and customary services in assisting the formation, capitalization, expansion, or offering of interests in an entity in which the partnership holds a significant equity interest, provided that the anticipated receipt of compensation for the services does not represent a significant purpose for the partnership's investment in the entity and is incidental to the investment in the entity.

Section 731(c)(3)(C)(iv) provides that, except as otherwise provided in regulations, a partnership is treated as engaged in any trade or business engaged in by (and as holding the assets of) any partnership in which the partnership holds an interest. The proposed regulations provide that this look-through rule does not apply if the upper-tier partnership does not participate in the management of the lower-tier partnership and the interest held by the upper-tier partnership is less than 10 percent of the total profits and capital interests in the lower-tier partnership.

Coordination with other sections

The proposed regulations provide rules for coordinating section 731(c) with section 704(c)(1)(B) and section 737. This coordination is necessary because a distribution of marketable securities could occur as part of a larger distribution in which property contributed by the distributee partner is distributed to another partner (section 704(c)(1)(B)) or the distributee partner receives property in addition to marketable securities (section 737).

Under the proposed regulations, the basis increase in the partner's interest in the partnership as a result of any gain recognized by the partner under section 704(c)(1)(B) is taken into account in determining the distributee partner's gain under section 731(c) and the partner's basis in the distributed securities. Taking the stepped-up basis into account for purposes of section 731 reflects the fact that the general effect of section 704(c)(1)(B) is to treat the contributing partner as having contributed property with a full fair market value basis at the time of contribution. The proposed regulations, however, provide that the basis increase in the partner's interest as a result of any gain recognized by the partner under section 737 is not taken into account for these purposes. The proposed regulations are consistent with section 737, which generally treats a distribution of money as occurring before, and independent of, a distribution of other property.

Anti-abuse rule

The proposed regulations provide that the provisions of section 731(c) and this section must be applied in a manner that is consistent with the purpose of section 731(c) and the substance of the transaction.

Proposed effective date

This section is proposed to apply to distributions of marketable securities by a partnership to a partner on or after Friday, December 29, 1995.

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in EO 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) and the Regulatory Flexibility Act (5 U.S.C. chapter 6) do not apply to these regulations, and, therefore, a Regulatory Flexibility Analysis is not required. Pursuant to section 7805(f) of the Internal Revenue Code, this notice of proposed rulemaking will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written comments (a signed original and eight (8) copies) that are timely submitted to the IRS. All comments will be available for public inspection and copying.

A public hearing has been scheduled for Wednesday, April 3, 1996 at 10:00 a.m. in the Auditorium of the Internal Revenue Building, 1111 Constitution Avenue NW., Washington, DC. Because of access restrictions, visitors will not be admitted beyond the Internal Revenue Building lobby more than 15 minutes before the hearing starts.

The rules of 26 CFR 601.601(a)(3) apply to the hearing.

Persons that wish to present oral comments at the hearing must submit written comments by Wednesday, March 13, 1996 and submit an outline of the topics to be discussed and the time to be devoted to each topic (signed original and eight (8) copies) by Wednesday, March 13, 1996.

A period of 10 minutes will be allotted to each person for making comments.

An agenda showing the scheduling of the speakers will be prepared after the deadline for receiving outlines has passed. Copies of the agenda will be available free of charge at the hearing.

Drafting Information

The principal authors of these regulations are Terri A. Belanger and William M. Kostak, Office of Assistant Chief Counsel (Passthroughs and Special Industries), IRS. However, other personnel from the IRS and Treasury Department participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

PART 1—INCOME TAXES

Paragraph 1. The authority citation for part 1 is amended by adding an entry in numerical order to read as follows:

Authority: 26 U.S.C. 7805. * * *
Section 1.731–2 also issued under 26 U.S.C. 731(c). * * *

Par. 2. Section 1.731–2 is added to read as follows:

§1.731–2 Partnership distributions of marketable securities.

(a) *Marketable securities treated as money*. Except as otherwise provided in section 731(c) and this section, for purposes of section 731(a)(1) and 737, the term *money* includes marketable securities and such securities are taken into account at their fair market value as of the date of the distribution.

(b) *Reduction of amount treated as money*—(1) *Aggregation of securities*. For purposes of section 731(c)(3)(B) and this paragraph (b), all marketable securities held by a partnership are treated as marketable securities of the same class and issuer as the distributed security.

(2) *Amount of reduction*. The amount of the distribution of marketable securities that is treated as a distribution of money under section 731(c) and paragraph (a) of this section is reduced (but not below zero) by the excess, if any, of—

(i) The distributee partner's distributive share of the net gain, if any, which would be recognized if all the marketable securities held by the partnership were sold (immediately before the transaction to which the distribution relates) by the partnership for fair market value; over

(ii) The distributee partner's distributive share of the net gain, if any, which is attributable to the marketable securities held by the partnership immediately after the transaction, determined by using the same fair market value as used under paragraph (b)(2)(i) of this section.

(3) *Distributee partner's share of net gain*. For purposes of section 731(c)(3)(B) and paragraph (b)(2) of this section, a partner's distributive share of net gain is determined—

(i) By taking into account any basis adjustments under section 743(b) with respect to that partner; and

(ii) Without taking into account any special allocations adopted with a principal purpose of avoiding the effect of section 731(c) and this section.

(c) *Marketable securities*—(1) *Actively traded*. For purposes of section

731(c) and this section, a financial instrument is actively traded (and thus is a marketable security) if it is of a type that is, as of the date of distribution, actively traded within the meaning of section 1092(d)(1). Thus, for example, if *XYZ* common stock is listed on a national securities exchange, particular shares of *XYZ* common stock that are distributed by a partnership are marketable securities even if those particular shares cannot be resold by the distributee partner for a designated period of time.

(2) *Interests in an entity*—(i) *Substantially all*. For purposes of section 731(c)(2)(B)(v) and this section, substantially all of the assets of an entity consist (directly or indirectly) of marketable securities, money, or both only if 90 percent or more of the assets of the entity (by value) at the time of the distribution of an interest in the entity consist (directly or indirectly) of marketable securities, money, or both.

(ii) *Less than substantially all*. For purposes of section 731(c)(2)(B)(vi) and this section, an interest in an entity is a marketable security to the extent that the value of the interest is attributable (directly or indirectly) to marketable securities, money, or both, if less than 90 percent but 20 percent or more of the assets of the entity (by value) at the time of the distribution of an interest in the entity consist (directly or indirectly) of marketable securities, money, or both.

(d) *Exceptions*—(1) *Previously contributed property*. Section 731(c) and this section do not apply to the distribution of a marketable security if the security was contributed to the partnership by the distributee partner, except to the extent that the value of the distributed security is attributable to marketable securities or money contributed (directly or indirectly) by the partnership to the entity to which the distributed security relates.

(2) *Security acquired in nonrecognition transaction*. Section 731(c) and this section do not apply to the distribution of a marketable security to the extent that—

(i) The security was acquired by the partnership in a nonrecognition transaction in exchange for any property except money or marketable securities (including a security that would have been treated as a marketable security under paragraph (c)(2) of this section if distributed at the time of the exchange);

(ii) The distributed security is actively traded as of the date of distribution; and

(iii) The security is distributed within five years of either the date on which the security was acquired by the partnership or, if later, the date on which the security became actively traded.

(3) *Security not marketable when acquired*. Section 731(c) and this section do not apply to the distribution of a marketable security if—

(i) The security was not actively traded as of the date acquired by the partnership and the entity to which the security relates had no outstanding actively traded securities on that date;

(ii) The security is actively traded as of the date of distribution; and

(iii) The security was held by the partnership for at least six months before the date the security became actively traded and the security was distributed within five years of the date on which the security became actively traded.

(4) *Successor security*. Section 731(c) and this section do not apply to the distribution of a marketable security to the extent that the security was acquired by the partnership in a nonrecognition transaction in exchange for a security the distribution of which immediately prior to the exchange would have been excepted under this paragraph (d).

(e) *Investment partnerships*—(1) *In general*. Section 731(c) and this section do not apply to the distribution of marketable securities by an investment partnership (as defined in section 731(c)(3)(C)(i)) to an eligible partner (as defined in section 731(c)(3)(C)(iii)).

(2) *Eligible partner*. For purposes of section 731(c)(3)(C)(iii) and this section, a partner is not treated as a partner other than an eligible partner solely because the partner contributed services to the partnership.

(3) *Trade or business activities*. For purposes of section 731(c)(3)(C) and this section, a partnership is not treated as engaged in a trade or business by reason of—

(i) Any activity undertaken as an investor, trader, or dealer in any asset described in section 731(c)(3)(C)(i), including the receipt of commitment fees, break-up fees, guarantee fees, director's fees, or similar fees that are customary in and incidental to any activities of the partnership as an investor, trader, or dealer in such assets;

(ii) Reasonable and customary management services (including the receipt of reasonable and customary fees in exchange for such management services) provided to an investment partnership (within the meaning of section 731(c)(3)(C)(i)) in which the partnership holds a partnership interest; or

(iii) Reasonable and customary services provided by the partnership in assisting the formation, capitalization, expansion, or offering of interests in a corporation (or other entity) in which the partnership holds or acquires a significant equity interest (including the provision of advice or consulting services, bridge loans, guarantees of obligations, or service on a company's board of directors), provided that the anticipated receipt of compensation for the services, if any, does not represent a significant purpose for the partnership's investment in the entity and is incidental to the investment in the entity.

(4) *Partnership tiers*. For purposes of section 731(c)(3)(C)(iv) and this section, a partnership (upper-tier partnership) is not treated as engaged in a trade or business engaged in by, or as holding (instead of a partnership interest) a proportionate share of the assets of, a partnership (lower-tier partnership) in which the partnership holds a partnership interest if—

(i) The upper-tier partnership does not participate in the management of the lower-tier partnership; and

(ii) The interest held by the upper-tier partnership is less than 10 percent of the total profits and capital interests in the lower-tier partnership.

(f) *Basis rules*—(1) *Partner's basis*—(i) *Partner's basis in distributed securities*. The distributee partner's basis in distributed marketable securities with respect to which gain is recognized by reason of section 731(c) and this section is the basis of the security determined under section 732, increased by the amount of such gain. Any increase in the basis of the marketable securities attributable to gain recognized by reason of section 731(c) and this section is allocated to marketable securities in proportion to their respective amounts of unrealized appreciation in the hands of the partner before such increase.

(ii) *Partner's basis in partnership interest*. The basis of the distributee partner's interest in the partnership is determined under section 733 as if no gain were recognized by the partner on the distribution by reason of section 731(c) and this section.

(2) *Basis of partnership property*. No adjustment is made to the basis of partnership property under section 734 as a result of any gain recognized by a partner, or any step-up in the basis in the distributed marketable securities in the hands of the distributee partner, by reason of section 731(c) and this section.

(g) *Coordination with other sections*—(1) *Section 704(c)(1)(B)*. The basis of the distributee partner's interest in the partnership for purposes of determining the amount of gain, if any, recognized by reason of section 731(c) (and for determining the basis of the marketable securities in the hands of the distributee partner) includes the increase, if any, in the partner's basis that occurs under section 704(c)(1)(B)-(iii) as a result of a distribution to another partner of property contributed by the distributee partner in a distribution that is part of the same distribution as the marketable securities.

(2) *Section 737*—(i) *Marketable securities as other property*. A distribution of marketable securities is treated as a distribution of property other than money for purposes of section 737 to the extent that the marketable securities are not treated as money under section 731(c). In addition, marketable securities contributed to the partnership are treated as property other than money in determining the contributing partner's net precontribution gain under section 737(b).

(ii) *Basis increase under section 737*. The basis of the distributee partner's interest in the partnership for purposes of determining the amount of gain, if any, recognized by reason of section 731(c) (and for determining the basis of the marketable securities in the hands of the distributee partner) does not include the increase, if any, in the partner's basis that occurs under section 737(c)(1) as a result of a distribution of property to the distributee partner in a distribution that is part of the same distribution as the marketable securities.

(h) *Anti-abuse rule*. The provisions of section 731(c) and this section must be applied in a manner consistent with the purpose of section 731(c) and the substance of the transaction. Accordingly, if a principal purpose of a transaction is to achieve a tax result that is inconsistent with the purpose of section 731(c) and this section, the Commissioner can recast the transaction for federal tax purposes as appropriate to achieve tax results that are consistent with the purpose of section 731(c) and this section. Whether a tax result is inconsistent with the purpose of section 731(c) and this section must be determined based on all the facts and circumstances. For example, under the provisions of this paragraph (h)—

(1) A change in partnership allocations or distribution rights with respect to marketable securities may be treated as a distribution of the marketable securities subject to section 731(c) if the change in allocations or distribution rights is, in substance, a distribution of the securities;

(2) A distribution of substantially all of the assets of the partnership other than marketable securities and money to some partners may also be treated as a distribution of marketable securities to the remaining partners if the distribution of the other property and the withdrawal of the other partners is, in substance, equivalent to a distribution of the securities to the remaining partners; and

(3) The distribution of multiple properties to one or more partners at different times may also be treated as part of a single distribution if the distributions are part of a single plan of distribution.

(i) [Reserved]

(j) *Examples*. The following examples illustrate the rules of this section. Unless otherwise specified, all securities held by a partnership are marketable securities within the meaning of section 731(c); the partnership holds no marketable securities other than the securities described in the example; all distributions by the partnership are subject to section 731(a) and are not subject to sections 704(c)(1)(B), 751(b), or 737; and no securities are eligible for an exception to section 731(c).

Example 1. Recognition of gain. (i) *A* and *B* form partnership *AB* as equal partners. *A* contributes property with a fair market value of $1,000 and an adjusted tax basis of $250. *B* contributes $1,000 cash. *AB* subsequently purchases Security *X* for $500 and immediately distributes the security to *A* in a current distribution. The basis in *A*'s interest in the partnership at the time of distribution is $250.

(ii) The distribution of Security *X* is treated as a distribution of money in an amount equal to the fair market value of Security *X* on the date of distribution ($500). (The amount of the distribution that is treated as money is not reduced under section 731(c)(3)(B) and paragraph (b) of this section because, if Security *X* had been sold immediately before the distribution, there would have been no gain recognized by *AB* and *A*'s distributive share of the gain would therefore have been zero.) As a result, *A* recognizes $250 of gain under section 731(a)(1) on the distribution ($500 distribution of money less $250 adjusted tax basis in *A*'s partnership interest).

Example 2. Reduction in amount treated as money—in general. (i) *A* and *B* form partnership *AB* as equal partners. *AB* subsequently distributes Security *X* to *A* in a current distribution. Immediately before the distribution, *AB* held securities with the following fair market values, adjusted tax bases, and unrecognized gain or loss:

	Value	*Basis*	*Gain (Loss)*
Security *X*	100	70	30
Security *Y*	100	80	20
Security *Z*	100	110	(10)

(ii) If *AB* had sold the securities for fair market value immediately before the distribution to *A*, the partnership would have recognized $40 of net gain ($30 gain on Security *X* plus $20 gain on Security *Y* minus $10 loss on Security *Z*). *A*'s distributive share of this gain would have been $20 (one-half of $40 net gain). If *AB* had sold the remaining securities immediately after the distribution of Security *X* to *A*, the partnership would have $10 of net gain ($20 of gain on Security *Y* minus $10 loss on Security *Z*). *A*'s distributive share of this gain would have been $5 (one-half of $10 net gain). As a result, the distribution resulted in a decrease of $15 in *A*'s distributive share of the net gain in *AB*'s securities ($20 net gain before distribution minus $5 net gain after distribution).

(iii) Under paragraph (b) of this section, the amount of the distribution of Security *X* that is treated as a distribution of money is reduced by $15. The distribution of Security *X* is therefore treated as a distribution of $85 of money to *A* ($100 fair market value of Security *X* minus $15 reduction).

Example 3. Reduction in amount treated as money—carried interest. (i) *A* and *B* form partnership *AB*. *A* contributes $1,000 and provides substantial services to the partnership in exchange for a 60 percent interest in partnership profits. *B* contributes $1,000 in exchange for a 40 percent interest in partnership profits. *AB* subsequently distributes Security *X* to *A* in a current distribution. Immediately before the distribution, *AB* held securities with the following fair market values, adjusted tax bases, and unrecognized gain:

	Value	*Basis*	*Gain*
Security *X*	100	80	20
Security *Y*	100	90	10

(ii) If *AB* had sold the securities for fair market value immediately before the distribution to *A*, the partnership would have recognized $30 of net gain ($20 gain on Security *X* plus $10 gain on Security *Y*). *A*'s distributive share of this gain would have been $18 (60 percent of $30 net gain). If *AB* had sold the remaining securities immediately after the distribution of Security *X* to *A*, the partnership would have $10 of net gain ($10 gain on Security *Y*). *A*'s distributive share of this gain would have been $6 (60 percent of $10 net gain). As a result, the distribution resulted in a decrease of $12 in *A*'s distributive share of the net gain in *AB*'s securities ($18 net gain before distribution minus $6 net gain after distribution).

(iii) Under paragraph (b) of this section, the amount of the distribution of Security *X* that is treated as a distribution of money is reduced by $12. The distribution of Security *X* is therefore treated as a distribution of $88 of money to *A* ($100 fair market value of Security *X* minus $12 reduction).

Example 4. Reduction in amount treated as money—change in partnership allocations. (i) *A* is admitted to partnership *ABC* as a partner with a 1 percent interest in partnership profits. At the time of *A*'s admission, *ABC* held no securities. *ABC* subsequently acquires Security *X*. *A*'s interest in partnership profits is subsequently increased to 2 percent for securities acquired after the increase. *A* retains a 1 percent interest in all securities acquired before the increase. *ABC* then acquires Securities *Y* and *Z* and later distributes Security *X* to *A* in a current distribution. Immediately before the distribution, the securities held by *ABC* had the following fair market values, adjusted tax bases, and unrecognized gain or loss:

	Value	*Basis*	*Gain (Loss)*
Security *X*	1,000	500	200
Security *Y*	1,000	800	200
Security *Z*	1,000	1,100	(100)

(ii) If *ABC* had sold the securities for fair market value immediately before the distribution to *A*, the partnership would have recognized $600 of net gain ($500 gain on Security *X* plus $200 gain on Security *Y* minus $100 loss on Security *Z*). *A*'s distributive share of this gain would have been $7 (1 percent of $500 gain on Security *X* plus 2 percent of $200 gain on Security *Y* minus 2 percent of $100 loss on Security *Z*).

(iii) If *ABC* had sold the remaining securities immediately after the distribution of Security *X* to *A*, the partnership would have $100 of net gain ($200 gain on Security *Y* minus $100 loss on Security *Z*). *A*'s distributive share of this gain would have been $2 (2 percent of $200 gain on Security *Y* minus 2 percent of $100 loss on Security *Z*). As a result, the distribution resulted in a decrease of $5 in *A*'s distributive share of the net gain in *ABC*'s securities ($7 net gain before distribution minus $2 net gain after distribution).

(iv) Under paragraph (b) of this section, the amount of the distribution of Security *X* that is treated as a distribution of money is reduced by $5. The distribution of Security *X* is therefore treated as a distribution of $95 of money to *A* ($100 fair market value of Security *X* minus $5 reduction).

Example 5. Basis consequences—distribution of marketable security. (i) *A* and *B* form partnership *AB* as equal partners. *A* contributes nondepreciable real property with a fair market value and adjusted tax basis of $100.

(ii) *AB* subsequently distributes Security *X* with a fair market value of $120 and an adjusted tax basis of $90 to *A* in a current distribution. At the time of distribution, the basis in *A*'s interest in the partnership is $100. The amount of the distribution that is treated as money is reduced under section 731(c)(3)(B) and paragraph (b)(2) of this section by $15 (one-half of $30 net gain in Security *X*). As a result, *A* recognizes $5 of gain under section 731(a) on the distribution (excess of $105 distribution of money over $100 adjusted tax basis in *A*'s partnership interest).

(iii) *A*'s adjusted tax basis in Security *X* is $95 ($90 adjusted basis of Security *X* determined under section 732(a)(1) plus $5 of gain recognized by *A* by reason of section 731(c)). The basis in *A*'s interest in the partnership is $10 as determined under section 733 ($100 predistribution basis minus $90 basis allocated to Security *X* under section 732).

Example 6. Basis consequences—distribution of marketable security and other property. (i) *A* and *B* form partnership *AB* as equal partners. *A* contributes nondepreciable real property, with a fair market value of $100 and an adjusted tax basis of $10.

(ii) *AB* subsequently distributes Security *X* with a fair market value and adjusted tax basis of $40 to *A* in a current distribution and, as part of the same distribution, *AB* distributes Property *Z* to *A* with an adjusted tax basis and fair market value of $40. At the time of distribution, the basis in *A*'s interest in the partnership is $10. *A* recognizes $30 of gain under section 731(a) on the distribution (excess of $40 distribution of money over $10 adjusted tax basis in *A*'s partnership interest).

(iii) *A*'s adjusted tax basis in Security *X* is $35 ($5 adjusted basis determined under section 732(a)(2) plus $30 of gain recognized by *A* by reason of section 731(c)). *A*'s basis in Property *Z* is $5, as determined under section 732(a)(2). The basis in *A*'s interest in the partnership is $0 as determined under section 733 ($10 predistribution basis minus $10 basis allocated between Security *X* and Property *Z* under section 732).

(iv) *AB*'s adjusted tax basis in the remaining partnership assets is unchanged unless the partnership has a section 754 election in effect. If *AB* made such an election, the aggregate basis of *AB*'s assets would be increased by $70 (the difference between the $80 combined basis of Security *X* and Property *Z* in the hands of the partnership before the distribution and the $10 combined basis of the distributed property in the hands of *A* under section 732 after the distribution). Under section 731(c)(5), no adjustment is made to partnership property under section 734 as a result of any gain recognized by *A* by reason of section 731(c) or as a result of any step-up in basis in the distributed marketable securities in the hands of *A* by reason of section 731(c).

Example 7. Coordination with section 737. (i) *A* and *B* form partnership *AB*. *A* contributes Property *A*, nondepreciable real property with a fair market value of $200 and an adjusted basis of $100 in exchange for a 25 percent interest in partnership capital and profits. *AB* owns marketable Security *X*.

(ii) Within five years of the contribution of Property *A*, *AB* subsequently distributes Security *X*, with a fair market value of $120 and an adjusted tax basis of $100, to *A* in a current distribution that is subject to section 737. As part of the same distribution, *AB* distributes Property *Y* to *A* with a fair market value of $20 and an adjusted tax basis of $0. At the time of distribution, there has been no change in the fair market value of Property *A* or the adjusted tax basis in *A*'s interest in the partnership.

(iii) If *AB* had sold Security *X* for fair market value immediately before the distribution to *A*, the partnership would have recognized $20 of gain. *A*'s distributive share of this gain would have been $5 (25 percent of $20 gain). Because *AB* has no other marketable securities, *A*'s distributive share of gain in partnership securities after the distribution would have been $0. As a result, the distribution resulted in a decrease of $5 in *A*'s share of the net gain in *AB*'s securities ($5 net gain before distribution minus $0 net gain after distribution). Under paragraph (b)(2) of this section, the amount of the distribution of Security *X* that is treated as a distribution of money is reduced by $5. The distribution of Security *X* is therefore treated as a distribution of $115 of money to *A* ($120 fair market value of Security *X* minus $5 reduction). The portion of the distribution of the marketable security that is not treated as a distribution of money ($5) is treated as other property for purposes of section 737.

(iv) *A* recognizes total gain of $40 on the distribution. *A* recognizes $15 of gain under section 731(a)(1) on the distribution of the portion of Security *X* treated as money ($115 distribution of money less $100 adjusted tax basis in *A*'s partnership interest). *A* recognizes $25 of gain under section 737 on the distribution of Property *Y* and the portion of Security *X* that is not treated as money. *A*'s section 737 gain is equal to the lesser of (i) *A*'s precontribution gain ($100) or (ii) the excess of the fair market value of property received ($20 fair market value of Property *Y* plus $5 portion of Security X not treated as money) over the adjusted basis in *A*'s interest in the partnership immediately before the distribution ($100) reduced (but not below zero) by the amount of money received in the distribution ($115).

(v) *A*'s adjusted tax basis in Security *X* is $115 ($100 basis of Security *X* determined under section 732(a) plus $15 of gain recognized by reason of section 731(c)). *A*'s adjusted tax basis in Property *Y* is $0 under section 732(a). The basis in *A*'s interest in the partnership is $25 ($100 basis before distribution minus $100 basis allocated to Security *X* under section 732(a) plus $25 gain recognized under section 737).

(k) *Effective date*. This section applies to distributions of marketable securities made on or after Friday, December 29, 1995.

Margaret Milner Richardson,
Commissioner of Internal Revenue.

(Filed by the Office of the Federal Register on December 29, 1995, 8:45 a.m., and published in the issue of the Federal Register for January 2, 1996, 61 F.R. 28)

Correction to Publication 595, *Tax Guide for Commercial Fishermen*

Announcement 96–8

The following correction should be made to the Capital Construction Fund (CCF) discussion on page 47 of Publication 595.

In the discussion of CCF Accounts, the first item of the numbered list under the heading ''Capital gain account'' should be corrected to read ''more than 6 months.'' It currently says ''6 months or less.''

Announcement of the Disbarment, Suspension, or Consent to Voluntary Suspension of Attorneys, Certified Public Accountants, Enrolled Agents and Enrolled Actuaries From Practice Before the Internal Revenue Service

Under 31 Code of Federal Regulations, Part 10, an attorney, certified public accountant, enrolled agent or enrolled actuary, in order to avoid the institution or conclusion of a proceeding for his disbarment or suspension from practice before the Internal Revenue Service, may offer his consent to suspension from such practice. The Director of Practice, in his discretion, may suspend an attorney, certified public accountant, enrolled agent or enrolled actuary in accordance with the consent offered.

Attorneys, certified public accountants, enrolled agents and enrolled actuaries are prohibited in any Internal Revenue Service matter from directly or indirectly employing, accepting assistance from, being employed by, or sharing fees with, any practitioner disbarred or suspended from practice before the Internal Revenue Service.

To enable attorneys, certified public accountants, enrolled agents and enrolled actuaries to identify practitioners under consent suspension from practice before the Internal Revenue Service, the Director of Practice will announce in the Internal Revenue Bulletin the names and addresses of practitioners who have been suspended from such practice, their designation as attorney, certified public accountant, enrolled agent or enrolled actuary and date or period of suspension. This announcement will appear in the weekly Bulletin at the earliest practicable date after such action and will continue to appear in the weekly Bulletins for five successive weeks or for as many weeks as is practicable for each attorney, certified public accountant, enrolled agent or enrolled actuary so suspended and will be consolidated and published in the Cumulative Bulletin.

The following individuals have been placed under consent suspension from practice before the Internal Revenue Service:

Name	Address	Designation	Date of Suspension
Isdaner, Thomas M.	Crofton, MD	CPA	October 31, 1995 to October 30, 1996
Cacciola, Marlene	Pittsburg, CA	Enrolled Agent	November 9, 1995 to May 8, 1996
Goldman, William D.	Hot Springs, AR	Attorney	November 9, 1995 to November 8, 1996
Armstrong, David L.	Norman, OK	CPA	Indefinite from November 10, 1995
Heckathorn, Ben	Red Oak, TX	CPA/ Attorney	Indefinite from November 28, 1995
Tisdel, Linda	Seattle, WA	Enrolled Agent	November 28, 1995 to May 27, 1997
Webb, Herbert M.	Gainsville, FL	Attorney	December 21, 1995 to June 20, 1997
Hipp, Robert J.	Evanston, IL	CPA	December 28, 1995 to April 27, 1996
Ruff, James M.	Willmar, MN	CPA	January 1, 1996 to March 31, 1996
Mulkerin, John J.	Wheaton, IL	CPA	January 5, 1996 to April 4, 1996
Redwitz, Robert	Irvine, CA	CPA	February 15, 1996 to May 14, 1996
Lind, Stanley L.	Milwaukee, WI	Attorney	March 1, 1996 to February 28, 1997
Dais, Robert E.	Plano, TX	CPA	March 1, 1996 to February 28, 1997

Under Section 330, Title 31 of the United States Code, the Secretary of the Treasury, after due notice and opportunity for hearing, is authorized to suspend or disbar from practice before the Internal Revenue Service any person who has violated the rules and regulations governing the recognition of attorneys, certified public accountants, enrolled agents or enrolled actuaries to practice before the Internal Revenue Service.

Attorneys, certified public accountants, enrolled agents, and enrolled actuaries are prohibited in any Internal Revenue Service matter from directly or indirectly employing, accepting assistance from, being employed by or sharing fees with, any practitioner disbarred or under suspension from practice before the Internal Revenue Service.

To enable attorneys, certified public accountants, enrolled agents and enrolled actuaries to identify such disbarred or suspended practitioners, the Director of Practice will announce in the Internal Revenue Bulletin the names and addresses of practitioners who have been suspended from such practice, their designation as attorney, certified public accountant, enrolled agent or enrolled actuary, and the date of disbarment or period of suspension. This announcement will appear in the weekly Bulletin for five successive weeks or as long as it is practicable for each attorney, certified public accountant, enrolled agent or enrolled actuary so suspended or disbarred and will be consolidated and published in the Cumulative Bulletin.

After due notice and opportunity for hearing before an administrative law judge, the following individuals have been disbarred from further practice before the Internal Revenue Service:

Name	Address	Designation	Effective Date
Muraskin, David	New York, NY	Attorney	November 6, 1995
Kelsey, Patrick	Poolesville, MD	CPA	November 13, 1995

Announcement of the Expedited Suspension of Attorneys, Certified Public Accountants, Enrolled Agents, and Enrolled Actuaries From Practice Before the Internal Revenue Service

Under title 31 of the Code of Federal Regulations, section 10.76, the Director of Practice is authorized to immediately suspend from practice before the Internal Revenue Service any practitioner who, within five years, from the date the expedited proceeding is instituted, (1) has had a license to practice as an attorney, certified public accountant, or actuary suspended or revoked for cause; or (2) has been convicted of any crime under title 26 of the United States Code or, of a felony under title 18 of the United States Code involving dishonesty or breach of trust.

Attorneys, certified public accountants, enrolled agents, and enrolled actuaries are prohibited in any Internal Revenue Service matter from directly or indirectly employing, accepting assistance from, being employed by, or sharing fees with, any practitioner disbarred or suspended from practice before the Internal Revenue Service.

To enable attorneys, certified public accountants, enrolled agents, and enrolled actuaries to identify practitioners under expedited suspension from practice before the Internal Revenue Service, the Director of Practice will announce in the Internal Revenue Bulletin the names and addresses of practitioners who have been suspended from such practice, their designation as attorney, certified public accountant, enrolled agent, or enrolled actuary, and date or period of suspension. This announcement will appear in the weekly Bulletin at the earliest practicable date after such action and will continue to appear in the weekly Bulletins for five successive weeks or for as many weeks as is practicable for each attorney, certified public accountant, enrolled agent, or enrolled actuary so suspended and will be consolidated and published in the Cumulative Bulletin.

The following individuals have been placed under suspension from practice before the Internal Revenue Service by virtue of the expedited proceeding provisions of the applicable regulations:

Name	Address	Designation	Date of Suspension
Trebatch, Henry T.	Great Neck, NY	CPA	Indefinite from November 6, 1995
Roomberg, Alan	Minersville, PA	CPA	Indefinite from November 10, 1995
Elfenbein, Emanuel B.	Miami, FL	Enrolled Agent	Indefinite from November 27, 1995
Cerullo, Louis, J.	Boca Raton, FL	CPA	Indefinite from November 27, 1995
Fogel, Harold	St. Paul, MN	CPA	Indefinite from December 13, 1995
Glover, Paul L.	Downers Grove, IL	Attorney	Indefinite from December 13, 1995
Miller, John R.	Akron, OH	Attorney	Indefinite from December 13, 1995
Pofahl, Charles	Dallas, TX	Attorney	Indefinite from December 18, 1995
Walburg, Douglas	Mahtomedi, MN	CPA	Indefinite from December 18, 1995
Hibler, Thomas M.	Plymouth, MI	CPA/ Attorney	Indefinite from December 18, 1995
Oringer, Ronald	Flanders, NJ	CPA	Indefinite from December 29, 1995
Butcher, Frederick	Stillwater, NJ	CPA	Indefinite from December 29, 1995
Tokars, Frederic	Atlanta, GA	Attorney	Indefinite from December 29, 1995
Atkins, Sanford I.	Moreland Hills, OH	Attorney	Indefinite from December 29, 1995

Definition of Terms

Revenue rulings and revenue procedures (hereinafter referred to as ''rulings'') that have an effect on previous rulings use the following defined terms to describe the effect:

Amplified describes a situation where no change is being made in a prior published position, but the prior position is being extended to apply to a variation of the fact situation set forth therein. Thus, if an earlier ruling held that a principle applied to A, and the new ruling holds that the same principle also applies to B, the earlier ruling is amplified. (Compare with *modified, below*).

Clarified is used in those instances where the language in a prior ruling is being made clear because the language has caused, or may cause, some confusion. It is not used where a position in a prior ruling is being changed.

Distinguished describes a situation where a ruling mentions a previously published ruling and points out an essential difference between them.

Modified is used where the substance of a previously published position is being changed. Thus, if a prior ruling held that a principle applied to A but not to B, and the new ruling holds that it applies to both A and B, the prior ruling is modified because it corrects a published position. (Compare with *amplified* and *clarified*, above).

Obsoleted describes a previously published ruling that is not considered determinative with respect to future transactions. This term is most commonly used in a ruling that lists previously published rulings that are obsoleted because of changes in law or regulations. A ruling may also be obsoleted because the substance has been included in regulations subsequently adopted.

Revoked describes situations where the position in the previously published ruling is not correct and the correct position is being stated in the new ruling.

Superseded describes a situation where the new ruling does nothing more than restate the substance and situation of a previously published ruling (or rulings). Thus, the term is used to republish under the 1986 Code and regulations the same position published under the 1939 Code and regulations. The term is also used when it is desired to republish in a single ruling a series of situations, names, etc., that were previously published over a period of time in separate rulings. If the new ruling does more than restate the substance of a prior ruling, a combination of terms is used. For example, *modified* and *superseded* describes a situation where the substance of a previously published ruling is being changed in part and is continued without change in part and it is desired to restate the valid portion of the previously published ruling in a new ruling that is self contained. In this case the previously published ruling is first modified and then, as modified, is superseded.

Supplemented is used in situations in which a list, such as a list of the names of countries, is published in a ruling and that list is expanded by adding further names in subsequent rulings. After the original ruling has been supplemented several times, a new ruling may be published that includes the list in the original ruling and the additions, and supersedes all prior rulings in the series.

Suspended is used in rare situations to show that the previous published rulings will not be applied pending some future action such as the issuance of new or amended regulations, the outcome of cases in litigation, or the outcome of a Service study.

Abbreviations

The following abbreviations in current use and formerly used will appear in material published in the Bulletin.

A—Individual.
Acq.—Acquiescence.
B—Individual.
BE—Beneficiary.
BK—Bank.
B.T.A.—Board of Tax Appeals.
C.—Individual.
C.B.—Cumulative Bulletin.
CFR—Code of Federal Regulations.
CI—City.
COOP—Cooperative.
Ct.D.—Court Decision.
CY—County.
D—Decedent.
DC—Dummy Corporation.
DE—Donee.
Del. Order—Delegation Order.
DISC—Domestic International Sales Corporation.
DR—Donor.
E—Estate.
EE—Employee.
E.O.—Executive Order.
ER—Employer.
ERISA—Employee Retirement Income Security Act.
EX—Executor.
F—Fiduciary.
FC—Foreign Country.
FICA—Federal Insurance Contribution Act.
FISC—Foreign International Sales Company.
FPH—Foreign Personal Holding Company.
F.R.—Federal Register.
FUTA—Federal Unemployment Tax Act.
FX—Foreign Corporation.
G.C.M.—Chief Counsel's Memorandum.
GE—Grantee.
GP—General Partner.
GR—Grantor
IC—Insurance Company.
I.R.B.—Internal Revenue Bulletin.
LE—Lessee.
LP—Limited Partner.
LR—Lessor.
M—Minor.
Nonacq.—Nonacquiescence.
O—Organization.
P—Parent Corporation.
PHC—Personal Holding Company.
PO—Possession of the U.S.
PR—Partner.
PRS—Partnership.
PTE—Prohibited Transaction Exemption.
Pub. L.—Public Law.
REIT—Real Estate Investment Trust.
Rev. Proc.—Revenue Procedure.
Rev. Rul.—Revenue Ruling.
S—Subsidiary.
S.P.R.—Statements of Procedural Rules.
Stat.—Statutes at Large.
T—Target Corporation.
T.C.—Tax Court.
T.D.—Treasury Decision.
TFE—Transferee.
TFR—Transferor.
T.I.R.—Technical Information Release.
TP—Taxpayer.
TR—Trust.
TT—Trustee.
U.S.C.—United States Code.
X—Corporation.
Y—Corporation.
Z—Corporation.

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[1]A cumulative list of all Revenue Rulings, Revenue Procedures, Treasury Decisions, etc., published in Internal Revenue Bulletins 1995–27 through 1995–52 will be found in Internal Revenue Bulletin 1996–1, dated January 2, 1996.

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[1]A cumulative finding list for previously published items mentioned in Internal Revenue Bulletins 1995–27 through 1995–52 will be found in Internal Revenue Bulletin 1996–1, dated January 2, 1996.