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## Section 2044.—Certain Property for Which Marital Deduction Was Previously Allowed

26 CFR 20.2044-1T: Certain property for which marital deduction was previously allowed (temporary).

T.D. 8714

### DEPARTMENT OF THE TREASURY Internal Revenue Service 26 CFR Part 20

#### Estate and Gift Tax Marital Deduction

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Temporary regulations.

SUMMARY: This document contains temporary regulations amending the final estate tax marital deduction regulations. The amendments are made to conform the estate tax regulations to recent court decisions. The amendments affect estates of decedents electing the marital deduction for qualified terminable interest property (QTIP) and the estates of the surviving spouses of such decedents. The text of these temporary regulations also serves as the text of REG-209830-96, page 7.

DATES: These regulations are effective February 18, 1997.

For dates of applicability of these regulations, see Effective Date under SUPPLEMENTARY INFORMATION.

FOR FURTHER INFORMATION CONTACT: Susan B. Hurwitz at (202) 622-3090 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

#### Background

On March 1, 1994, the IRS published final Estate and Gift Tax Regulations (26 CFR part 20 and part 25) under sections 2044, 2056, 2207A, 2519, 2523, and 6019 of the Internal Revenue Code (Code) in the **Federal Register** (59 FR 9642). At the time the regulations were published, the position con-

tained in § 20.2056(b)-7(d)(3) was the subject of litigation in a number of cases and had been rejected by two circuit courts in *Estate of Clayton v. Commissioner*, 976 F.2d 1486 (5th Cir. 1992), *rev'g* 97 T.C. 327 (1991), and *Estate of Robertson v. Commissioner*, 15 F.3d 779 (8th Cir. 1994), *rev'g* 98 T.C. 678 (1992). Since that time, *Estate of Spencer v. Commissioner*, 43 F.3d 226 (6th Cir. 1995), *rev'g* T.C. Memo.1 1992-579, also rejecting the IRS position, has been decided. Additionally, in *Estate of Clack v. Commissioner*, 106 T.C. 131 (1996), the Tax Court reversed the position it had taken previously in *Estate of Clayton*, *Estate of Robertson*, and *Estate of Spencer*. This temporary regulation amends the final regulations in accordance with the circuit courts' decisions in *Estate of Clayton*, *Estate of Robertson*, and *Estate of Spencer*, and the Tax Court's decision in *Estate of Clack*.

#### Explanation of Provisions

Section 20.2056(b)-7T(d)(3)(ii) has been added. As a result of the addition, an income interest (or life estate) that is contingent upon the executor's election under section 2056(b)(7)(B)(v) will not be precluded, on that basis, from qualification as a "qualifying income interest for life" within the meaning of section 2056(b)(7)(B)(ii).

In accordance with the addition of § 20.2056(b)-7T(d)(3)(ii), § 20.2056(b)-7T(h) *Example 6*(ii) and § 20.2044-1T *Example 8* are added.

#### Effective Date

These regulations are effective in the case of qualified terminable interest property elections made after February 18, 1997.

#### 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) does not apply to these regulations and, because these regulations do not impose on small entities a collection of information requirement, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Therefore, a Regulatory Flexibility Analysis is not required. Pursuant to section 7805(f) of the Internal Revenue Code, these temporary regulations will

be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

#### Drafting Information

The principal author of these regulations is Susan B. Hurwitz, Office of Assistant Chief Counsel (Passthroughs and Special Industries). However, 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 part 20 is amended as follows:

#### PART 20—ESTATE TAX; ESTATES OF DECEDENTS DYING AFTER AUGUST 16, 1954

Paragraph 1. The authority citation for part 20 continues to read in part as follows:

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

Par. 2. Section 20.2044-1T is added to read as follows:

§ 20.2044-1T *Certain property for which marital deduction was previously allowed (temporary)*.

(a) through (d). [Reserved]. For further guidance, see § 20.2044-1(a) through (d).

(e) *Examples*. [Reserved]. For further guidance, see § 20.2044-1(e).

*Example 1* through *Example 7*. [Reserved]. For further guidance, see § 20.2044-1(e) *Example 1* through *Example 7*.

*Example 8. Inclusion of trust property when surviving spouse dies before first decedent's estate tax return is filed.* D dies on July 1, 1997. D's estate tax return is due after February 18, 1997. Under the terms of D's will, a trust is established for the benefit of D's spouse, S. The will provides that S is entitled to receive the income from that portion of the trust that the executor elects to treat as qualified terminable interest property. The trust terms otherwise provide S with a qualifying income interest for life under section 2056(b)(7)(B)(ii). S dies on February 10, 1998. On April 1, 1998, D's executor files D's estate tax return on which an election is made to treat a portion of the trust as qualified terminable interest property under section 2056(b)(7). S's estate tax return is filed on November 10, 1998. The value on the date of S's death of the portion of the trust for which D's executor made a QTIP election is includible in S's gross estate under section 2044.

Par. 3. Section 20.2056(b)-7T is added to read as follows:

§ 20.2056(b)–7T Election with respect to life estate for surviving spouse (temporary).

(a) through (d)(2) [Reserved]. For further guidance, see § 20.2056(b)–7(a) through (d)(2).

(d)(3) *Contingent income interests.* (i) [Reserved]. For further guidance, see § 20.2056(b)–7(d)(3).

(ii) An income interest for a term of years, or a life estate subject to termination upon the occurrence of a specified event (e.g., remarriage), is not a qualifying income interest for life. However, an income interest for life (or life estate) that is contingent upon the executor's election under section 2056(b)(7)(B)(v) will not, on that basis, fail to be a qualifying income interest for life. This paragraph (d)(3)(ii) applies with respect to estates of decedents whose estate tax

returns are due after February 18, 1997.

(d)(4) through (g) [Reserved]. For further guidance see § 20.2056(b)–7(d)(4) through (g).

(h) *Examples.* [Reserved]. See § 20.2056(b)–7(h).

*Example 1 through Example 5.* [Reserved]. For further guidance, see § 20.2056(b)–7(h) *Example 1 through Example 5.*

*Example 6.* (i) [Reserved]. For further guidance, see § 20.2056(b)–7(h) *Example 6.*

(ii) D's estate tax return is due after February 18, 1997. D's will established a trust providing that S is entitled to receive the income from that portion of the trust that the executor elects to treat as qualified terminable interest property. S's interest in the trust otherwise meets the requirements of a qualifying income interest for life under section 2056(b)(7)(B)(ii). Accordingly, the executor may elect qualified terminable interest treatment for any portion of the trust.

Par. 4. Section 20.2056(b)–10T is added to read as follows:

§ 20.2056(b)–10T *Effective dates (temporary).*

In addition to the effective dates set out in § 20.2056(b)–10, § 20.2056(b)–7T(d)(3)(ii) is effective with respect to estates of decedents dying after March 1, 1994. For further guidance, see § 20.2056(b)–10.

Margaret Milner Richardson,  
*Commissioner of Internal Revenue.*

Approved January 8, 1997.

Donald C. Lubick,  
*Assistant Secretary of the Treasury.*

(Filed by the Office of the Federal Register on February 14, 1997, 8:45 a.m., and published in the issue of the Federal Register for February 18, 1997, 62 F.R. 7156)

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