

Notice of Proposed Rulemaking and Notice of Public Hearing

Predeceased Parent Rule

REG-145988-03

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 predeceased parent rule, which provides an exception to the general rules of section 2651 of the Internal Revenue Code (Code) for determining the generation assignment of a transferee of property for generation-skipping transfer (GST) tax purposes. These proposed regulations also provide rules regarding a transferee assigned to more than one generation. The proposed regulations reflect changes to the law made by the Taxpayer Relief Act of 1997 and generally apply to individuals, trusts, and estates. This document also provides notice of a public hearing on these proposed regulations.

DATES: Written or electronic comments must be received by December 2, 2004. Requests to speak and outlines of topics to be discussed at the public hearing scheduled for December 14, 2004, at 10 a.m., must be received by November 23, 2004.

ADDRESSES: Send submissions to CC:PA:LPD:PR (REG-145988-03), room 5203, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG-145988-03), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC, or sent electronically, via the IRS Internet site at: www.irs.gov/reg or via the Federal eRulemaking portal at www.regulations.gov (IRS and REG-145988-03). The public hearing will be held in the IRS Auditorium, Inter-

nal Revenue Building, 1111 Constitution Avenue, NW, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Lian A. Mito at (202) 622-7830; concerning submissions of comments, the hearing and/or to be placed on the building access list to attend the hearing, Guy R. Traynor, (202) 622-7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

This document contains proposed regulations under sections 2651(e) and (f)(1) of the Internal Revenue Code (Code). Section 2651(e) was added to the Code by section 511(a) of the Taxpayer Relief Act of 1997 (Public Law 105-34; 111 Stat. 778; 1997-4 C.B. 1, vol. 1) (the 1997 Act) and expands the predeceased parent exception from GST tax previously contained in former section 2612(c)(2).

Under chapter 13 of the Code, a GST tax is imposed on all transfers, whether made directly or indirectly, to skip persons. Generally, a skip person is a person who is two or more generations below the generation of the transferor, or a trust if all of the interests are held by skip persons. The transferor is the individual who transferred property in a transaction subject to the gift or estate tax. Transfers that are subject to the GST tax are direct skips, taxable terminations, and taxable distributions. A direct skip is a transfer subject to gift or estate tax of an interest in property to a skip person. A taxable termination is the termination by death, lapse of time, release of power, or otherwise, of an interest in property held in a trust unless, immediately after the termination, a non-skip person has an interest in the property or at no time after the termination may a distribution be made from the trust to a skip person. A taxable distribution is any distribution (other than a direct skip or taxable termination) from a trust to a skip person.

For transfers before 1998, former section 2612(c)(2) provided an exception to the general rule that a transfer, either outright or in trust, to a grandchild of the transferor was a direct skip. Under for-

mer section 2612(c)(2), if a parent of the transferor's grandchild was a lineal descendant of the transferor and that parent was deceased at the time of the transfer, the grandchild was treated as the child of the transferor for purposes of determining whether a transfer was a direct skip. This rule also applied to a transfer made to a grandchild of the transferor's spouse or former spouse if a parent of the grandchild was a lineal descendant of the transferor's spouse or former spouse and that parent was deceased at the time of the transfer.

Former section 2612(c)(2) further provided that, if a transferor's grandchild was treated as the transferor's child, the lineal descendants of that grandchild also moved up one generation level. Furthermore, if any transfer of property to a trust would be a direct skip but for the application of the exception, any generation assignment determined under this exception also applied for purposes of applying chapter 13 of the Code to transfers from the portion of the trust attributable to the property. Therefore, a subsequent distribution of property from a trust to a grandchild treated as a child of the transferor was not treated as a taxable distribution.

Section 511(a) of the 1997 Act repealed former section 2612(c)(2) and replaced it with new subsection (e) of section 2651, which contains the rules for assigning individuals to generations for purposes of the GST tax. Section 2651(e) broadens the predeceased parent rule by expanding its application to: (1) transfers that would be taxable distributions or taxable terminations; and (2) transfers to collateral heirs (lineal descendants of the transferor's parents, or the parents of the transferor's spouse or former spouse), provided that the transferor (or the transferor's spouse or former spouse) has no living lineal descendants at the time of the transfer. Section 2651(e) applies to terminations, distributions, and transfers occurring after December 31, 1997.

Section 2651(e) applies if an individual is a descendant of a parent of the transferor (or the transferor's spouse or former spouse) and if the individual's parent, who also is a lineal descendant of the parent of the transferor (or the transferor's spouse or former spouse), died prior to

the time the transferor is subject to estate or gift tax on the transfer from which an interest of that individual is established or derived. If these criteria are satisfied, then the individual is treated under section 2651(e) as if the individual is a member of the generation that is one generation below the lower of either the transferor's generation or the generation of the individual's youngest living lineal ancestor who is also a descendant of the parent of the transferor (or the transferor's spouse or former spouse). Section 2651(e) does not apply, however, to a transfer to an individual who is not a lineal descendant of the transferor (or the transferor's spouse or former spouse) if, at the time of the transfer, the transferor (or the transferor's spouse or former spouse, if applicable) has any living lineal descendant.

Explanation of Provisions

Predeceased Parent Rule

The proposed regulations provide rules and examples regarding the predeceased parent rule of section 2651(e). One issue addressed in these proposed regulations is the time when an interest is established or derived. The proposed regulations provide that, for purposes of section 2651(e), an individual's interest in property or a trust is established or derived at the time the transferor is subject to transfer tax under chapter 11 or 12 of the Code. If a transferor is subject to transfer tax under chapter 11 or 12 of the Code on the property transferred on more than one occasion, then the individual's interest will be considered established or derived on the earliest of those occasions.

However, the proposed regulations provide an exception to this general rule for remainder interests in trusts for which an election under section 2056(b)(7) (QTIP election) has been made to treat all or part of the trust as qualified terminable interest property (QTIP). Specifically, to the extent of the QTIP election, the remainder beneficiary's interest will be deemed to have been established or derived on the death of the transferor's spouse (the income beneficiary), rather than on the transferor's earlier death. Absent this exception, a remainder beneficiary of a QTIP trust would not benefit from the predeceased parent rule if the remainder beneficiary's parent is alive

when the QTIP trust is established, but is deceased when the income beneficiary's interest terminates. Without this exception, the rule under section 2651(e) would be more restrictive than the previous rule under former section 2612(c)(2) which, by referring to the transfer from the transferor (*i.e.*, the surviving spouse, in the case of a QTIP trust), would have made the predeceased parent rule available to the remainder beneficiary. The rule under section 2651(e), however, does not apply to any trust for which the election under section 2652(a)(3) (reverse QTIP) is made. If a reverse QTIP election is made, the grantor remains the transferor of the trust for purposes of chapter 13 of the Code. In most cases in which the reverse QTIP election has been made for a trust, the transferor's GST exemption has been allocated to the trust. Thus, the trust will be exempt from GST tax.

Solely for purposes of section 2651(e), these proposed regulations limit the term *ancestor* to a lineal ancestor. No inference should be drawn with respect to the definition of *ancestor* for purposes of any other section of the Code.

Individuals Assigned to More Than One Generation

Under section 2651(f)(1), an individual who would be assigned to more than one generation is assigned to the youngest of those generations. This rule prevents the avoidance of the GST tax through adoption or marriage. Thus, for example, a transferor cannot avoid GST tax by adopting the transferor's adult grandchild. The Treasury Department and IRS believe, however, that it is reasonable to presume that tax avoidance is not a primary motive when a transferor adopts a descendant of a parent of the transferor (or the transferor's spouse or former spouse) who is a minor. Thus, under the proposed regulations, if an adoptive parent legally adopts an individual who is: (1) a descendant of a parent of the adoptive parent (or the adoptive parent's spouse or former spouse); and (2) under the age of 18 at the time of the adoption, then the adopted individual will be treated as a member of the generation that is one generation below the adoptive parent for purposes of determining whether a transfer from the adoptive parent (or the spouse or former spouse of the

adoptive parent, or a lineal descendant of a grandparent of the adoptive parent) to the adopted individual is subject to GST tax.

In addition, the proposed regulations provide that if an individual's generation assignment is adjusted with regard to a transfer under either section 2651(e) or as a result of an adoption described above, a corresponding adjustment with respect to that transfer is made to the generation assignment of that individual's spouse or former spouse, that individual's descendants, and the spouse or former spouse of each of that individual's descendants.

Special Analyses

It has been determined that these proposed regulations are not a significant regulatory action as defined in Executive Order 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) does not apply to these regulations and because these regulations do not impose a collection of information on small entities, 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 Code, these regulations will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact.

Comments and Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written (a signed original and eight (8) copies) or electronic comments that are submitted timely to the IRS. The IRS and Treasury Department also request comments on the clarity of the proposed rules and how they can be made easier to understand. All comments will be available for public inspection and copying.

A public hearing has been scheduled for December 14, 2004, beginning at 10 a.m., in the Auditorium of the Internal Revenue Building, 1111 Constitution Avenue, NW, Washington, DC. Due to building security procedures, visitors must enter at the Constitution Avenue entrance. In addition, all visitors must present photo identification to enter the building. Because of access

restrictions, visitors will not be admitted beyond the immediate entrance area more than 30 minutes before the hearing starts. For information about having your name placed on the building access list to attend the hearing, see the "FOR FURTHER INFORMATION CONTACT" section of this preamble.

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to present oral comments at the hearing must submit electronic or written comments and an outline of the topics to be discussed and the time to be devoted to each topic (signed original and eight (8) copies) by December 2, 2004. 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 author of these proposed regulations is Lian A. Mito of the Office of Associate Chief Counsel (Passthroughs and Special Industries). However, other personnel from the IRS and Treasury Department participated in their development.

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Proposed Amendments to the Regulations

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

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

Paragraph 1. The authority citation for part 26 continues to read, in part, as follows:

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

Par. 2. In §26.2600–1, the table is amended by:

1. Removing the entries for §26.2612–1, paragraphs (a)(1) and (a)(2).
2. Adding entries for §§26.2651–1, 26.2651–2, and 26.2651–3.

The additions read as follows:

§26.2600–1 Table of contents.

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§26.2612–1 Definitions.

(a) * * *

* * * * *

§26.2651–1 Generation assignment.

(a) Special rule for persons with a deceased parent.

- (1) In general.
 - (2) Special rules.
 - (3) Established or derived.
 - (4) Special rule in the case of additional contributions to a trust.
- (b) Limited application to collateral heirs.
- (c) Examples.

§26.2651–2 Individual assigned to more than one generation.

- (a) In general.
- (b) Exception.
- (c) Special rules.
 - (1) Corresponding generation adjustment.
 - (2) Continued application of generation assignment.

§26.2651–3 Effective dates.

- (a) In general.
 - (b) Transition rule.
- Par. 3. Section 26.2612–1 is amended by:

1. Removing the paragraph designation and heading for (a)(1).
2. Removing paragraph (a)(2).
3. Removing the second sentence of paragraph (f).
4. Removing *Examples 6* and *7* in paragraph (f).
5. Redesignating *Examples 8* through *15* as *Examples 6* through *13* in paragraph (f).
6. Revising the first sentence of newly designated *Example 7* in paragraph (f).
7. Revising the first sentence of newly designated *Example 11* in paragraph (f).

The revisions read as follows:

§26.2612–1 Definitions.

(a) * * *

* * * * *

(f) * * *

Example 7. Taxable termination resulting from distribution. The facts are the same as in *Example 6*, except twenty years after C's death the trustee exercises its discretionary power and distributes the entire principal to GGC. * * *

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Example 11. Exercise of withdrawal right as taxable distribution. The facts are the same as in *Example 10*, except GC holds a continuing right to withdraw trust principal and after one year GC withdraws \$10,000. * * *

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Par. 4. Sections 26.2651–1, 26.2651–2, and 26.2651–3 are added to read as follows:

§26.2651–1 Generation assignment.

(a) *Special rule for persons with a deceased parent—(1) In general.* This paragraph (a) applies for purposes of determining whether a transfer to or for the benefit of an individual who is a descendant of a parent of the transferor (or the transferor's spouse or former spouse) is a generation-skipping transfer. If that individual's parent, who is a lineal descendant of the parent of the transferor (or the transferor's spouse or former spouse), is deceased at the time the transfer (from which an interest of such individual is established or derived) is subject to the tax imposed by chapter 11 or 12 of the Internal Revenue Code on the transferor, the individual is treated as if that individual were a member of the generation that is one generation below the lower of—

- (i) The transferor's generation; or
- (ii) The generation assignment of the individual's youngest living lineal ancestor who is also a descendant of the parent of the transferor (or the transferor's spouse or former spouse).

(2) *Special rules—(i) Corresponding generation adjustment.* If an individual's generation assignment is adjusted with respect to a transfer in accordance with paragraph (a)(1) of this section, a corresponding adjustment with respect to that transfer is made to the generation assignment of each—

- (A) Spouse or former spouse of that individual;
- (B) Descendant of that individual; and
- (C) Spouse or former spouse of each descendant of that individual.

(ii) *Continued application of generation assignment.* If a transfer to a trust would be a generation-skipping transfer but for paragraph (a)(1) of this section, any generation assignment determined under this paragraph (a) 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 generation-skipping transfer.

(iii) *Ninety-day rule.* For purposes of paragraph (a)(1) of this section, any individual who dies no later than 90 days after a transfer is treated as having predeceased the transferor.

(iv) *Local law.* Except as provided in paragraph (a)(2)(iii) of this section, a living descendant is not treated as having predeceased the transferor solely by reason of a provision of applicable local law; e.g., an individual who disclaims is not treated as a predeceased parent solely because state law treats a disclaimant as having predeceased the transferor for purposes of determining the disposition of the disclaimed property.

(3) *Established or derived.* For purposes of section 2651(e) and paragraph (a)(1) of this section, an individual's interest is established or derived at the time the transferor who transferred the property that makes up the interest is subject to transfer tax imposed by either chapter 11 or 12 of the Internal Revenue Code on the property transferred. If the transferor will be subject to transfer tax imposed by either chapter 11 or 12 of the Internal Revenue Code on the property transferred on more than one occasion, then the relevant time for determining whether paragraph (a)(1) of this section applies is the earliest time at which the transferor is subject to the tax imposed by either chapter 11 or 12 of the Internal Revenue Code. However, for purposes of section 2651(e) and paragraph (a)(1) of this section, the interest of a remainder beneficiary in a trust for which an election under section 2056(b)(7) (QTIP election) has been made will be deemed to have been established or derived, to the extent of the QTIP election, on the death of the transferor's spouse (the income beneficiary). The preceding sentence does not apply to a trust for which the election under section 2652(a)(3) (reverse QTIP election) is made.

(4) *Special rule in the case of additional contributions to a trust.* If a transferor referred to in paragraph (a)(1) of this section contributes additional property to a trust that existed before the application of paragraph (a)(1), then the additional property is treated as being held in a separate trust for purposes of chapter 13 of the Internal Revenue Code. The provisions of §26.2654-1(a)(2) apply as if the portions of the single trust had had separate transferors. Other subsequent contributions are treated as contributions to the appropriate portion of the single trust.

(b) *Limited application to collateral heirs.* Paragraph (a) of this section does not apply in the case of a transfer to any individual who is not a lineal descendant of the transferor (or of the transferor's spouse or former spouse) if the transferor (or the transferor's spouse or former spouse) has any living lineal descendant at the time of the transfer.

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

Example 1. T establishes an irrevocable trust, 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 or on GC's prior death, Trust is to terminate and the principal is to be distributed to GC if GC is living or to GC's children if GC has died. The transfer that occurred on the creation of the trust is subject to the tax imposed by chapter 12 of the Internal Revenue Code and, at the time of the transfer, T's child, C, who is a parent of GC, is deceased. GC is treated as a member of the generation that is one generation below T's generation. As a result, GC is not a skip person and Trust is not a skip person. Therefore, the transfer to Trust is not a direct skip. Similarly, distributions to GC during the term of Trust and at the termination of Trust will not be GSTs.

Example 2. On January 1, 2004, T transfers \$100,000 to an *inter vivos* trust that provides T with an annuity payable for four 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. The transfer is subject to the tax imposed by chapter 12 of the Internal Revenue Code and, at the time of the transfer, T's child, C, who is a parent of GC, is living. C dies in 2006. In this case, C was alive at the time the transfer by T is subject to the tax imposed by chapter 12 of the Internal Revenue Code. Therefore, section 2651(e) and paragraph (a)(1) of this section do not apply. When the trust subsequently terminates, the distribution to GC is a taxable termination.

Example 3. T dies testate in 2002, survived by T's spouse, S, their children, C1 and C2, and C1's child, GC. Under the terms of T's will, a trust is established for the benefit of S and their descendants. Under the terms of the trust, all income is payable to S during S's lifetime and the trustee may distribute trust corpus for S's health, support and mainte-

nance. At S's death, the corpus is to be distributed, outright, to C1 and C2. If either C1 or C2 has predeceased S, the deceased child's share of the corpus is to be distributed to that child's descendants, per stirpes. The executor of T's estate makes the election under section 2056(b)(7) to treat the trust property as qualified terminable interest property (QTIP) but does not make the election under section 2652(a)(3) (reverse QTIP election). In 2003, C1 dies survived by S and GC. In 2004, S dies, and the trust terminates. The full fair market value of the trust is includable in S's gross estate under section 2044 and S becomes the transferor of the trust under section 2652(a)(1)(A). Under the rule in paragraph (a)(3) of this section, GC's interest is considered established or derived at S's death, and because C1 is deceased at that time, GC is treated as a member of the generation that is one generation below the generation of the transferor, S. As a result, GC is not a skip person and the transfer to GC is not a direct skip.

Example 4. The facts are the same as in *Example 3*. However, the executor of T's estate makes the election under section 2652(a)(3) (reverse QTIP election) for the entire trust. Therefore, T remains the transferor because, for purposes of chapter 13 of the Internal Revenue Code, the election to be treated as qualified terminable interest property is treated as if it had not been made. In this case, the rule in paragraph (a)(3) of this section does not apply, so GC's interest is established or derived on T's death in 2002. Because C1 was living at the time of T's death, the predeceased parent rule under section 2651(e) does not apply, even though C1 was deceased at the time the transfer from S to GC is subject to the tax under chapter 11 of the Internal Revenue Code. When the trust terminates, the distribution to GC is a taxable termination that is subject to the GST tax to the extent the trust has an inclusion ratio greater than zero. See section 2642(a).

Example 5. T establishes an irrevocable trust providing that trust income is to be paid to T's grandniece, GN, for 5 years or until GN's prior death. At the end of the 5-year period or on GN's prior death, the trust is to terminate and the principal is to be distributed to GN if living, or if GN has died, to GN's descendants, per stirpes. S is a sibling of T and the parent of N. N is the parent of GN. At the time of the transfer, T has no living lineal descendant, S is living, N is deceased, and the transfer is subject to the gift tax imposed by chapter 12 of the Internal Revenue Code. GN is treated as a member of the generation that is one generation below T's generation because S, GN's youngest living lineal ancestor who is also a descendant of T's parent, is in T's generation. As a result, GN is not a skip person and the transfer to the trust is not a direct skip. In addition, distributions to GN during the term of the trust and at the termination of the trust will not be GSTs.

Example 6. On January 1, 2004, T transfers \$50,000 to the great grandchild, GGC, of B, a brother of T. At the time of the transfer, B's grandchild, GC, who is a parent of GGC and a child of B's living child, C, is deceased. GGC will be treated as a member of the generation that is one generation below the lower of T's generation or the generation assignment of GGC's youngest living lineal ancestor who is also a descendant of the parent of the transferor. In this case, C is GGC's youngest living lineal ancestor who is also a descendant of the parent of

T. Because C's generation assignment is lower than T's generation, GGC will be treated as a member of the generation that is one generation below C's generation assignment (*i.e.*, GGC will be treated as a member of GC's generation). As a result, GGC remains a skip person and the transfer to GGC is a direct skip.

§26.2651-2 Individual assigned to more than 1 generation.

(a) *In general.* Except as provided in paragraphs (b) or (c) of this section, an individual who would be assigned to more than 1 generation is assigned to the youngest of the generations to which that individual would be assigned.

(b) *Exception.* An adopted individual will be treated as a member of the generation that is one generation below the adoptive parent for purposes of determining whether a transfer to the adopted individual from the adoptive parent (or the spouse or former spouse of the adoptive parent, or a lineal descendant of a grandparent of the adoptive parent) is subject to chapter 13 of the Internal Revenue Code. For purposes of this paragraph (b), an adopted individual is an individual who is—

(1) A descendant of a parent of the adoptive parent (or the spouse or former spouse of the adoptive parent); and

(2) Under the age of 18 at the time of the adoption.

(c) *Special rules—(1) Corresponding generation adjustment.* If an individual's generation assignment is adjusted with respect to a transfer in accordance with paragraph (b) of this section, a corresponding adjustment with respect to that transfer is made to the generation assignment of each—

(i) Spouse or former spouse of that individual;

(ii) Descendant of that individual; and

(iii) Spouse or former spouse of each descendant of that individual.

(2) *Continued application of generation assignment.* If a transfer to a trust would be a generation-skipping transfer but for paragraph (b) of this section, any generation assignment determined under paragraph (b) of this section 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 generation-skipping transfer.

§26.2651-3 Effective dates.

(a) *In general.* The rules of §§ 26.2651-1 and 26.2651-2 are applicable for terminations, distributions, and transfers occurring on or after the date these regulations are issued as final regulations in the **Federal Register**.

(b) *Transition rule.* (1) The rule contained in the last two sentences of § 26.2651-1(a)(3) is applicable for terminations, distributions, and transfers occurring on or after the date these regulations are issued as final regulations in the **Federal Register**.

(2) Except as provided in paragraph (b)(1) of this section, in the case of transfers occurring after December 31, 1997, and before the date that this document is published in the **Federal Register** as a final regulation, taxpayers may rely on any reasonable interpretation of section 2651(e). For this purpose, these proposed regulations are treated as a reasonable interpretation of the statute.

Deborah M. Nolan,
*Acting Deputy Commissioner for
Services and Enforcement.*

(Filed by the Office of the Federal Register on September 2, 2004, 8:45 a.m., and published in the issue of the Federal Register for September 3, 2004, 69 F.R. 53862)