[4830-01-p]

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 20

[REG-106706-18]

RIN 1545-B072

Estate and Gift Taxes; Difference in the Basic Exclusion Amount

AGENCY: Internal Revenue Service (IRS), Treasury.

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

SUMMARY: This document contains proposed regulations addressing the effect of recent legislative changes to the basic exclusion amount used in computing Federal gift and estate taxes. The proposed regulations will affect donors of gifts made after 2017 and the estates of decedents dying after 2017.

DATES: Written and electronic comments must be received by [**INSERT DATE 90 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER**]. Outlines of topics to be discussed at the public hearing scheduled for March 13, 2019, must be received by [**INSERT DATE 90 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER**]. If no outlines of topics are received by [**INSERT DATE 90 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER**], the hearing will be cancelled.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG-106706-18), Room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions also may be hand delivered Monday through Friday between the hours of 8 a.m. and 5 p.m. to: CC:PA:LPD:PR (REG-106706-18), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC 20224, or sent electronically via the Federal eRulemaking portal at http://www.regulations.gov (IRS REG-106706-18). The public hearing will be held in the Auditorium, Internal Revenue Service Building, 1111 Constitution Avenue, NW, Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Deborah S. Ryan, (202) 317-6859; concerning submissions of comments, the hearing, and/or to be placed on the building access list to attend the hearing, Regina L. Johnson at (202) 317-6901 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

I. Overview

In computing the amount of Federal gift tax to be paid on a gift or the amount of Federal estate tax to be paid at death, the gift and estate tax provisions of the Internal Revenue Code (Code) apply a unified rate schedule to the taxpayer's cumulative taxable gifts and taxable estate on death to arrive at a net tentative tax. The net tentative tax then is reduced by a credit based on the applicable exclusion amount (AEA), which is the sum of the basic exclusion amount (BEA) within the meaning of section 2010(c)(3) of the Code and, if applicable, the deceased spousal unused exclusion (DSUE) amount within the meaning of section 2010(c)(4). In certain cases, the AEA also includes a restored exclusion amount pursuant to Notice 2017-15, 2017-6 I.R.B. 783. Prior to January 1, 2018, for estates of decedents dying and gifts made beginning in 2011, section 2010(c)(3) provided a BEA of $5 million, indexed for inflation after 2011. The credit is applied first against the gift tax, on a cumulative basis, as taxable gifts are made. To the extent that any credit remains at death, it is applied against the estate tax.

This document contains proposed regulations to amend the Estate Tax Regulations (26 CFR part 20) under section 2010(c)(3) of the Code. The proposed regulations would update §20.2010-1 to conform to statutory changes to the determination of the BEA enacted on December 22, 2017, by sections 11002 and 11061 of the Tax Cuts and Jobs Act, Public Law 115–97, 131 Stat. 2504 (2017) (TCJA).

II. Federal Gift Tax Computation Generally

The Federal gift tax is imposed by section 2501 of the Code on an individual's transfers by gift during each calendar year. The gift tax is determined under a seven-step computation required under sections 2502 and 2505 using the rate schedule set forth in section 2001(c) as in effect for the calendar year in which the gifts are made.

First, section 2502(a)(1) requires the determination of a tentative tax (that is, a tax unreduced by a credit amount) on the sum of all taxable gifts, whether made in the current year or in one or more prior periods (Step 1).

Second, section 2502(a)(2) requires the determination of a tentative tax on the sum of the taxable gifts made in all prior periods (Step 2).

Third, section 2502(a) requires the tentative tax determined in Step 2 to be subtracted from the tentative tax determined in Step 1 to arrive at the net tentative gift tax on the gifts made in the current year (Step 3).

Fourth, section 2505(a)(1) requires the determination of a credit equal to the applicable credit amount within the meaning of section 2010(c). The applicable credit amount is the tentative tax on the AEA determined as if the donor had died on the last day of the current calendar year. The AEA is the sum of the BEA as in effect for the year in which the gift was made, any DSUE amount as of the date of the gift as computed pursuant to §25.2505-2, and any restored exclusion amount as of the date of the gift as computed pursuant to Notice 2017-15 (Step 4).

Fifth, section 2505(a)(2) and the flush language at the end of section 2505(a) require the determination of the sum of the amounts allowable as a credit to offset the gift tax on gifts made by the donor in all preceding calendar periods. For purposes of this determination, the allowable credit for each preceding calendar period is the tentative tax, computed at the tax rates in effect for the current period, on the AEA for such prior period, but not exceeding the tentative tax on the gifts actually made during such prior period. Section 2505(c). (Step 5).

Sixth, section 2505(a) requires that the total credit allowable for prior periods determined in Step 5 be subtracted from the credit for the current period determined in Step 4. (Step 6).

Finally, section 2505(a) requires that the credit amount determined in Step 6 be subtracted from the net tentative gift tax determined in Step 3 (Step 7).

III. Federal Estate Tax Computation Generally

The Federal estate tax is imposed by section 2001(a) on the transfer of a decedent’s taxable estate at death. The estate tax is determined under a five-step computation required under sections 2001 and 2010 using the same rate schedule used for gift tax purposes (thus referred to as the unified rate schedule) as in effect at the decedent’s death.

First, section 2001(b)(1) requires the determination of a tentative tax (again, a tax unreduced by a credit amount) on the sum of the taxable estate and the adjusted taxable gifts, defined as all taxable gifts made after 1976 other than those included in the gross estate (Step 1).

Second, section 2001(b)(2) and (g) require the determination of a hypothetical gift tax (a gift tax reduced, but not to below zero, by the credit amounts allowable in the years of the gifts) on all post-1976 taxable gifts, whether or not included in the gross estate. The credit amount allowable for each year during which a gift was made is the tentative tax, computed using the tax rates in effect at the decedent's death, on the AEA for that year, but not exceeding the tentative tax on the gifts made during that year. Section 2505(c). The AEA is the sum of the BEA as in effect for the year in which the gift was made, any DSUE amount as of the date of the gift as computed pursuant to §25.2505-2, and any restored exclusion amount as of the date of the gift as computed pursuant to Notice 2017-15. This hypothetical gift tax is referred to as the gift tax payable (Step 2).

Third, section 2001(b) requires the gift tax payable determined in Step 2 to be subtracted from the tentative tax determined in Step 1 to arrive at the net tentative estate tax (Step 3).

Fourth, section 2010(a) and (c) require the determination of a credit equal to the tentative tax on the AEA as in effect on the date of the decedent's death. This credit may not exceed the net tentative estate tax. Section 2010(d). (Step 4).

Finally, section 2010(a) requires that the credit amount determined in Step 4 be subtracted from the net tentative estate tax determined in Step 3. (Step 5).

IV. TCJA Amendments

Section 11061 of the TCJA amended section 2010(c)(3) to provide that, for decedents dying and gifts made after December 31, 2017, and before January 1, 2026, the BEA is increased by $5 million to $10 million as adjusted for inflation (increased BEA). On January 1, 2026, the BEA will revert to $5 million. Thus, an individual or the individual's estate may utilize the increased BEA to shelter from gift and estate taxes an additional $5 million of transfers made during the eight-year period beginning on January 1, 2018, and ending on December 31, 2025 (increased BEA period).

In addition, section 11002 of the TCJA amended section 1(f)(3) of the Code to base the determination of annual cost-of-living adjustments, including those for gift and estate tax purposes, on the Chained Consumer Price Index for All Urban Consumers for all taxable years beginning after December 31, 2017. Section 11002 of the TCJA also made conforming changes in sections 2010(c)(3)(B)(ii), 2032A(a)(3)(B), and 2503(b)(2)(B).

Section 11061 of the TCJA also added section 2001(g)(2) to the Code, which, in addition to the necessary or appropriate regulatory authority granted in section 2010(c)(6) for purposes of section 2010(c), directs the Secretary to prescribe such regulations as may be necessary or appropriate to carry out section 2001 with respect to any difference between the BEA applicable at the time of the decedent's death and the BEA applicable with respect to any gifts made by the decedent.

V. Summary of Concerns Raised by Changes in BEA

1. In General

Given the cumulative nature of the gift and estate tax computations and the differing manner in which the credit is applied against these two taxes, commenters have raised two questions regarding a potential for inconsistent tax treatment or double taxation of transfers resulting from the temporary nature of the increased BEA. First, in cases in which a taxpayer exhausted his or her BEA and paid gift tax on a pre-2018 gift, and then either makes an additional gift or dies during the increased BEA period, will the increased BEA be absorbed by the pre-2018 gift on which gift tax was paid so as to deny the taxpayer the full benefit of the increased BEA during the increased BEA period? Second, in cases in which a taxpayer made a gift during the increased BEA period that was fully sheltered from gift tax by the increased BEA but makes a gift or dies after the increased BEA period has ended, will the gift that was exempt from gift tax when made during the increased BEA period have the effect of increasing the gift or estate tax on the later transfer (in effect, subjecting the earlier gift to tax even though it was exempt from gift tax when made)?

As discussed in the remainder of this Background section, the Treasury Department and the IRS have analyzed the statutorily required steps for determining Federal gift and estate taxes in the context of several different situations that could occur either during the increased BEA period as a result of an increase in the BEA, or thereafter as a result of a decrease in the BEA. Only in the last situation discussed below was a potential problem identified, and a change intended to correct that problem is proposed in this notice of proposed rulemaking. This preamble, however, also includes a brief explanation of the reason why no potential problem is believed to exist in any of the first three situations discussed below. For the sake of simplicity, the following discussion assumes that, as may be the more usual case, the AEA includes no DSUE or restored exclusion amount and thus, refers only to the BEA.

2. Effect of Increase in BEA on Gift Tax

The first situation considered is whether, for gift tax purposes, the increased BEA available during the increased BEA period is reduced by pre-2018 gifts on which gift tax actually was paid. This issue arises for donors, who made both pre-2018 gifts exceeding the then-applicable BEA, thus making gifts that incurred a gift tax liability, and additional gifts during the increased BEA period. The concern raised is whether the gift tax computation will apply the increased BEA to the pre-2018 gifts, thus reducing the BEA otherwise available to shelter gifts made during the increased BEA period and, in effect, allocating credit to a gift on which gift tax in fact was paid.

Step 3 of the gift tax determination requires the tentative tax on all gifts from prior periods to be subtracted from the tentative tax on the donor's cumulative gifts (including the current gift). The gifts from prior periods include the pre-2018 gifts on which gift tax was paid. In this way, the full amount of the gift tax liability on the pre-2018 gifts is removed from the current year gift tax computation, regardless of whether that liability was sheltered from gift tax by the BEA and/or was satisfied by a gift tax payment. Steps 4 through 6 of the gift tax determination then require, in effect, that the BEA for the current year be reduced by the BEA allowable in prior periods against the gifts that were made by the donor in those prior periods. The increased BEA was not available in the years when the pre-2018 gifts were made and thus, was not allowable against those gifts. Accordingly, the gift tax determination appropriately reduces the increased BEA only by the amount of BEA allowable against prior period gifts, thereby ensuring that the increased BEA is not reduced by a prior gift on which gift tax in fact was paid.

3. Effect of Increase in BEA on Estate Tax

The second situation considered is whether, for estate tax purposes, the increased BEA available during the increased BEA period is reduced by pre-2018 gifts on which gift tax actually was paid. This issue arises in the context of estates of decedents who both made pre-2018 gifts exceeding the then allowable BEA, thus making gifts that incurred a gift tax liability, and die during the increased BEA period. The concern raised is whether the estate tax computation will apply the increased BEA to the pre-2018 gifts, thus reducing the BEA otherwise available against the estate tax during the increased BEA period and, in effect, allocating credit to a gift on which gift tax in fact was paid.

Step 3 of the estate tax determination requires that the hypothetical gift tax on the decedent's post-1976 taxable gifts be subtracted from the tentative tax on the sum of the taxable estate and adjusted taxable gifts. The post-1976 taxable gifts include the pre-2018 gifts on which gift tax was paid. In this way, the full amount of the gift tax liability on the pre-2018 gifts is removed from the estate tax computation, regardless of whether that liability was sheltered from gift tax by the BEA and/or was satisfied by a gift tax payment. Step 4 of the estate tax determination then requires that a credit on the amount of the BEA for the year of the decedent's death be subtracted from the net tentative estate tax. As a result, the only time that the increased BEA enters into the computation of the estate tax is when the credit on the amount of BEA allowable in the year of the decedent's death is netted against the tentative estate tax, which in turn already has been reduced by the hypothetical gift tax on the full amount of all post-1976 taxable gifts (whether or not gift tax was paid). Thus, the increased BEA is not reduced by the portion of any prior gift on which gift tax was paid, and the full amount of the increased BEA is available to compute the credit against the estate tax.

4. Effect of Decrease in BEA on Gift Tax

The third situation considered is whether the gift tax on a gift made after the increased BEA period is inflated by a theoretical gift tax on a gift made during the increased BEA period that was sheltered from gift tax when made. If so, this would effectively reverse the benefit of the increased BEA available for gifts made during the increased BEA period. This issue arises in the case of donors who both made one or more gifts during the increased BEA period that were sheltered from gift tax by the increased BEA in effect during those years, and made a post-2025 gift. The concern raised is whether the gift tax determination on the post-2025 gift will treat the gifts made during the increased BEA period as gifts not sheltered from gift tax by the credit on the BEA, given that the post-2025 gift tax determination is based on the BEA then in effect, rather than on the increased BEA.

Just as in the first situation considered in part V(2) of this Background section, Step 3 of the gift tax determination directs that the tentative tax on gifts from prior periods be subtracted from the tentative tax on the donor's cumulative gifts (including the current gift). The gift tax from prior periods includes the gift tax attributable to the gifts made during the increased BEA period. In this way, the full amount of the gift tax liability on the increased BEA period gifts is removed from the computation, regardless of whether that liability was sheltered from gift tax by the BEA or was satisfied by a gift tax payment. All that remains is the tentative gift tax on the donor's current gift. Steps 4 through 6 of the gift tax determination then require that the credit based on the BEA for the current year be reduced by such credits allowable in prior periods. Even if the sum of the credits allowable for prior periods exceeds the credit based on the BEA in the current (post-2025) year, the tax on the current gift cannot exceed the tentative tax on that gift and thus will not be improperly inflated. The gift tax determination anticipates and avoids this situation, but no credit will be available against the tentative tax on the post-2025 gift.

5. Effect of Decrease in BEA on Estate Tax

The fourth situation considered is whether, for estate tax purposes, a gift made during the increased BEA period that was sheltered from gift tax by the increased BEA inflates a post-2025 estate tax liability. This will be the case if the estate tax computation fails to treat such gifts as sheltered from gift tax, in effect reversing the benefit of the increased BEA available for those gifts. This issue arises in the case of estates of decedents who both made gifts during the increased BEA period that were sheltered from gift tax by the increased BEA in effect during those years, and die after 2025. The concern raised is whether the estate tax computation treats the gifts made during the increased BEA period as post-1976 taxable gifts not sheltered from gift tax by the credit on the BEA, given that the post-2025 estate tax computation is based on the BEA in effect at the decedent's death rather than the BEA in effect on the date of the gifts.

In this case, the statutory requirements for the computation of the estate tax, in effect, retroactively eliminate the benefit of the increased BEA that was available for gifts made during the increased BEA period. This can be illustrated by the following examples.

> Example 1. Individual A made a gift of $11 million in 2018, when the BEA was $10 million. A dies in 2026, when the BEA is $5 million, with a taxable estate of $4 million. Based on a literal application of section 2001(b), the estate tax would be approximately $3,600,000, which is equal to a 40 percent estate tax on $9 million (specifically, the $9 million being the sum of the $4 million taxable estate and $5 million of the 2018 gift sheltered from gift tax by the increased BEA). This in effect would impose estate tax on the portion of the 2018 gift that was sheltered from gift tax by the increased BEA allowable at that time.

> Example 2. The facts are the same as in Example 1, but A dies in 2026 with no taxable estate. Based on a literal application of section 2001(b), A's estate tax is approximately $2 million, which is equal to a 40 percent tax on $5 million. Five million dollars is the amount by which, after taking into account the $1 million portion of the 2018 gift on which gift tax was paid, the 2018 gift exceeded the BEA at death. This, in effect, would impose estate tax on the portion of the 2018 gift that was sheltered from the gift tax by the excess of the 2018 BEA over the 2026 BEA.

This problem occurs as a result of the interplay between Steps 2 and 4 of the estate tax determination, and the differing amounts of BEA taken into account in those steps. Step 2 determines the credit against gift taxes payable on all post-1976 taxable gifts, whether or not included in the gross estate, using the BEA amounts allowable on the dates of the gifts but determined using date of death tax rates. Step 3 subtracts gift tax payable from the tentative tax on the sum of the taxable estate and the adjusted taxable gifts. The result is the net tentative estate tax. Step 4 determines a credit based on the BEA as in effect on the date of the decedent's death. Step 5 then reduces the net tentative estate tax by the credit determined in Step 4. If the credit amount applied at Step 5 is less than that allowable for the decedent's post-1976 taxable gifts at Step 2, the effect is to increase the estate tax by the difference between those two credit amounts. In this circumstance, the statutory requirements have the effect of imposing an estate tax on gifts made during the increased BEA period that were sheltered from gift tax by the increased BEA in effect when the gifts were made.

Explanation of Provisions

To implement the TCJA changes to the BEA under section 2010(c)(3), the proposed regulations would amend §20.2010-1 to provide that, in the case of decedents dying or gifts made after December 31, 2017, and before January 1, 2026, the increased BEA is $10 million. The proposed regulations also would conform the rules of §20.2010-1 to the changes made by the TCJA regarding the cost of living adjustment.

Pursuant to section 2001(g)(2), the proposed regulations also would amend §20.2010-1 to provide a special rule in cases where the portion of the credit as of the decedent's date of death that is based on the BEA is less than the sum of the credit amounts attributable to the BEA allowable in computing gift tax payable within the meaning of section 2001(b)(2). In that case, the portion of the credit against the net tentative estate tax that is attributable to the BEA would be based upon the greater of those two credit amounts. In the view of the Treasury Department and the IRS, the most administrable solution would be to adjust the amount of the credit in Step 4 of the estate tax determination required to be applied against the net tentative estate tax. Specifically, if the total amount allowable as a credit, to the extent based solely on the BEA, in computing the gift tax payable on the decedent's post-1976 taxable gifts, whether or not included in the gross estate, exceeds the credit amount, again to the extent based solely on the BEA in effect at the date of death, the Step 4 credit would be based on the larger amount of BEA. As modified, Step 4 of the estate tax determination therefore would require the determination of a credit equal to the tentative tax on the AEA as in effect on the date of the decedent's death, where the BEA included in that AEA is the larger of (i) the BEA as in effect on the date of the decedent's death under section 2010(c)(3), or (ii) the total amount of the BEA allowable in determining Step 2 of the estate tax computation (that is, the gift tax payable).

For example, if a decedent had made cumulative post-1976 taxable gifts of $9 million, all of which were sheltered from gift tax by a BEA of $10 million applicable on the dates of the gifts, and if the decedent died after 2025 when the BEA was $5 million, the credit to be applied in computing the estate tax is that based upon the $9 million of BEA that was used to compute gift tax payable.

The proposed regulations ensure that a decedent's estate is not inappropriately taxed with respect to gifts made during the increased BEA period. Congress' grant of regulatory authority in section 2001(g)(2) to address situations in which differences exist between the BEA applicable to a decedent's gifts and the BEA applicable to the decedent's estate clearly permits the Secretary to address the situation in which a gift is made during the increased BEA period and the decedent dies after the increased BEA period ends.

Commenters have noted that this problem is similar to that involving the application of the AEA addressed in the DSUE regulations. Section 20.2010-3(b). The DSUE amount generally is what remains of a decedent's BEA that can be used to offset the gift and/or estate tax liability of the decedent's surviving spouse. At any given time, however, a surviving spouse may use only the DSUE amount from his or her last deceased spouse – thus, only until the death of any subsequent spouse. Without those regulations, if a DSUE amount was used to shelter a surviving spouse's gifts from gift tax before the death of a subsequent spouse, and if the surviving spouse also survived the subsequent spouse, those gifts would have had the effect of absorbing the DSUE amount available to the surviving spouse at death, effectively resulting in a taking back of the DSUE amount that had been allocated to the earlier gifts. The DSUE regulations resolve this problem by providing that the DSUE amount available at the surviving spouse's death is the sum of the DSUE amount from that spouse's last deceased spouse, and any DSUE amounts from other deceased spouses that were "applied to one or more taxable gifts" of the surviving spouse.

Proposed Effective Date

The amendment to §20.2010-1 is proposed to be effective on and after the date of publication of a Treasury decision adopting these rules as final regulations in the **Federal Register**.

Special Analyses

These proposed regulations are not subject to review under section 6(b) of Executive Order 12866 pursuant to the Memorandum of Agreement (April 11, 2018) between the Treasury Department and the Office of Management and Budget regarding review of tax regulations.

Pursuant to the Regulatory Flexibility Act (5 U.S.C. chapter 6), it is hereby certified that these proposed regulations will not have a significant economic impact on a substantial number of small entities. These proposed regulations apply to donors of gifts made after 2017 and to the estates of decedents dying after 2017, and implement an increase in the amount that is excluded from gift and estate tax. Neither an individual nor the estate of a deceased individual is a small entity within the meaning of 5 U.S.C. 601(6). Accordingly, a regulatory flexibility analysis is not required.

Pursuant to section 7805(f) of the Internal Revenue Code, this regulation has been 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 or electronic comments that are submitted timely (in the manner described under the **ADDRESSES** heading) to the IRS. The Treasury Department and the IRS request comments on all aspects of the proposed regulations. All comments will be available at http://www.regulations.gov, or upon request. A public hearing on these proposed regulations has been scheduled for March 13, 2019, beginning at 10 A.M. in the Auditorium, Internal Revenue Building, 1111 Constitution Avenue, NW, Washington, DC 20224. Due to building security procedures, visitors must enter 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 comments by **[INSERT DATE 90 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**, and submit an outline of the topics to be discussed and the time devoted to each topic by **[INSERT DATE 90 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

A period of 10 minutes will be allotted to each person for making comments. Copies of the agenda will be available free of charge at the hearing.

Drafting Information

The principal author of these proposed regulations is Deborah S. Ryan, Office of the Associate Chief Counsel (Passthroughs and Special Industries). Other personnel from the Treasury Department and the IRS participated in their development.

Statement of Availability of IRS Documents

Notice 2017-15 is published in the Internal Revenue Bulletin (or Cumulative Bulletin) and is available from the Superintendent of Documents, U.S. Government Publishing Office, Washington, DC 20402, or by visiting the IRS website at http://www.irs.gov.

List of Subjects in 26 CFR Part 20

Estate taxes, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 20 is proposed to be amended as follows:

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

Par. 1. The authority citation for part 20 is amended by revising the entry for §20.2010-1 to read in part as follows:

Authority: 26 U.S.C. 7805.

* * * * *

Section 20.2010-1 also issued under 26 U.S.C. 2001(g)(2) and 26 U.S.C. 2010(c)(6).

* * * * *

Par. 2. Section 20.2010-1 is amended by:

1. Redesignating paragraphs (c) through (e) as paragraphs (d) through (f) respectively;

2. Adding a new paragraph (c); and

3. Revising newly redesignated paragraphs (e)(3) and (f).

The addition and revisions read as follows:

§20.2010-1 Unified credit against estate tax; in general.

* * * * *

(c) Special rule in the case of a difference between the basic exclusion amount applicable to gifts and that applicable at the donor's date of death--(1) Rule. Changes in the basic exclusion amount that occur between the date of a donor's gift and the date of the donor's death may cause the basic exclusion amount allowable on the date of a gift to exceed that allowable on the date of death. If the total of the amounts allowable as a credit in computing the gift tax payable on the decedent's post-1976 gifts, within the meaning of section 2001(b)(2), to the extent such credits are based solely on the basic exclusion amount as defined and adjusted in section 2010(c)(3), exceeds the credit allowable within the meaning of section 2010(a) in computing the estate tax, again only to the extent such credit is based solely on such basic exclusion amount, in each case by applying the tax rates in effect at the decedent's death, then the portion of the credit allowable in computing the estate tax on the decedent's taxable estate that is attributable to the basic exclusion amount is the sum of the amounts attributable to the basic exclusion amount allowable as a credit in computing the gift tax payable on the decedent's post-1976 gifts. The amount allowable as a credit in computing gift tax payable for any year may not exceed the tentative tax on the gifts made during that year, and the amount allowable as a credit in computing the estate tax may not exceed the net tentative tax on the taxable estate. Sections 2505(c) and 2010(d).

(2) Example. Individual A (never married) made cumulative post-1976 taxable gifts of $9 million, all of which were sheltered from gift tax by the cumulative total of $10 million in basic exclusion amount allowable on the dates of the gifts. A dies after 2025 and the basic exclusion amount on A's date of death is $5 million. A was not eligible for any restored exclusion amount pursuant to Notice 2017-15. Because the total of the amounts allowable as a credit in computing the gift tax payable on A's post-1976 gifts (based on the $9 million basic exclusion amount used to determine those credits) exceeds the credit based on the $5 million basic exclusion amount applicable on the decedent's date of death, under paragraph (c)(1) of this section, the credit to be applied for purposes of computing the estate tax is based on a basic exclusion amount of $9 million, the amount used to determine the credits allowable in computing the gift tax payable on the post-1976 gifts made by A.

* * * * *

(e) * * *

(3) Basic exclusion amount. Except to the extent provided in paragraph (e)(3)(iii) of this section, the basic exclusion amount is the sum of the amounts described in paragraphs (e)(3)(i) and (ii) of this section.

(i) For any decedent dying in calendar year 2011 or thereafter, $5,000,000; and

(ii) For any decedent dying after calendar year 2011, $5,000,000 multiplied by the cost-of-living adjustment determined under section 1(f)(3) for the calendar year of decedent’s death by substituting “calendar year 2010” for “calendar year 2016” in section 1(f)(3)(A)(ii) and rounded to the nearest multiple of $10,000.

(iii) In the case of the estates of decedents dying after December 31, 2017, and before January 1, 2026, paragraphs (e)(3)(i) and (ii) of this section will be applied by substituting “$10,000,000” for “$5,000,000.”

(f) Applicability dates--(1) In general. Except as provided in paragraph (f)(2) of this section, this section applies to the estates of decedents dying after June 11, 2015. For the rules applicable to estates of decedents dying after December 31, 2010, and before June 12, 2015, see §20.2010-1T, as contained in 26 CFR part 20, revised as of April 1, 2015.

(2) Exceptions. Paragraph (c) of this section applies to estates of decedents dying on and after the date of publication of a Treasury decision adopting these rules as final regulations. Paragraph (e)(3) of this section applies to the estates of decedents dying after December 31, 2017.

§20.2010-3 [Amended]

Par. 3. Section 20.2010-3 is amended by removing “§20.2010-1(d)(5)” wherever it appears and adding in its place “§20.2010-1(e)(5)”.

Kirsten Wielobob,

Deputy Commissioner for Service and Enforcement.

[FR Doc. 2018-25538 Filed: 11/20/2018 4:15 pm; Publication Date: 11/23/2018]