

employment in the United States and elects to receive a reduced retirement annuity in order to provide *S* with a survivor annuity upon *D*'s death. The transfer of rights to *S* in the joint and survivor annuity is a gift by *D* for gift tax purposes. However, under paragraph (b) of this section, the gift qualifies for the gift tax marital deduction even though *S* is not a United States citizen.

*Example 3. Transfer of present interest in trust property.* In 1995, *D*, a resident alien, transfers property valued at \$500,000 in trust to *S*, who is also a resident alien. The trust instrument provides that the trust income is payable to *S* at least quarterly and *S* has a testamentary general power to appoint the trust corpus. The transfer to *S* qualifies for the marital deduction under section 2523 but for the provisions of section 2523(i)(1). Because *S* has a life income interest in the trust, *S* has a present interest in a portion of the trust. Accordingly, *D* may exclude the present value of *S*'s income interest (up to \$100,000) from *D*'s total 1995 calendar year gifts.

*Example 4. Transfer of present interest in trust property.* The facts are the same as in *Example 3*, except that *S* does not have a testamentary general power to appoint the trust corpus. Instead, *D*'s child, *C*, has a remainder interest in the trust. If *S* were a United States citizen, the transfer would qualify for the gift tax marital deduction if a qualified terminable interest property election was made under section 2523(f)(4). However, because *S* is not a U.S. citizen, *D* may not make a qualified terminable interest property election. Accordingly, the gift does not qualify for the gift tax marital deduction but for the disallowance provision of section 2523(i)(1). The \$100,000 annual exclusion under section 2523(i)(2) is not available with respect to *D*'s transfer in trust and *D* may not exclude the present value of *S*'s income interest in excess of \$10,000 from *D*'s total 1995 calendar year gifts.

*Example 5. Spouse becomes citizen after transfer.* *D*, a United States citizen, transfers a residence valued at \$350,000 on December 20, 1995, to *D*'s spouse, *S*, a resident alien. On January 31, 1996, *S* becomes a naturalized United States citizen. On *D*'s federal gift tax return for 1995, *D* must include \$250,000 as a gift (\$350,000 transfer less \$100,000 exclusion). Although *S* becomes a citizen in January, 1996, *S* is not a citizen of the United States at the time the transfer is made. Therefore, no gift tax marital deduction is allowable. However, the transfer does qualify for the \$100,000 annual exclusion.

[T.D. 8612, 60 FR 43552, Aug. 22, 1995]

**§ 25.2523(i)-2 Treatment of spousal joint tenancy property where one spouse is not a United States citizen.**

(a) *In general.* In the case of a joint tenancy with right of survivorship between spouses, or a tenancy by the entirety, where the donee spouse is not a United States citizen, the gift tax treatment of the creation and termination of the tenancy (regardless of whether the donor is a citizen, resident or nonresident not a citizen of the United States at such time), is governed by the principles of sections 2515 and 2515A (as such sections were in effect before their repeal by the Economic Recovery Tax Act of 1981). However, in applying these principles, the donor spouse may not elect to treat the creation of a tenancy in real property as a gift, as provided in section 2515(c) (prior to its repeal by the Economic Recovery Tax Act of 1981, Pub. L. 97-34, 95 Stat. 172).

(b) *Tenancies by the entirety and joint tenancies in real property—(1) Creation of the tenancy on or after July 14, 1988.* Under the principles of section 2515 (without regard to section 2515(c)), the creation of a tenancy by the entirety (or joint tenancy) in real property (either by one spouse alone or by both spouses), and any additions to the value of the tenancy in the form of improvements, reductions in indebtedness thereon, or otherwise, is not deemed to be a transfer of property for purposes of the gift tax, regardless of the proportion of the consideration furnished by each spouse, but only if the creation of the tenancy would otherwise be a gift to the donee spouse who is not a citizen of the United States at the time of the gift.

(2) *Termination—(i) Tenancies created after December 31, 1954 and before January 1, 1982 not subject to an election under section 2515(c), and tenancies created on or after July 14, 1988.* When a tenancy to which this paragraph (b) applies is terminated on or after July 14, 1988, other than by reason of the death of a spouse, then, under the principles of section 2515, a spouse is deemed to have made a gift to the extent that the proportion of the total consideration furnished by the spouse, multiplied by the proceeds

of the termination (whether in the form of cash, property, or interests in property), exceeds the value of the proceeds of termination received by the spouse. See section 2523(i), and §§ 25.2523(i)-1 and § 25.2503-2(f) as to certain of the tax consequences that may result upon termination of the tenancy. This paragraph (b)(2)(i) applies to tenancies created after December 31, 1954, and before January 1, 1982, not subject to an election under section 2515(c), and to tenancies created on or after July 14, 1988.

(ii) *Tenancies created after December 31, 1954 and before January 1, 1982 subject to an election under section 2515(c) and tenancies created after December 31, 1981 and before July 14, 1988.* When a tenancy to which this paragraph (b) applies is terminated on or after July 14, 1988, other than by reason of the death of a spouse, then, under the principles of section 2515, a spouse is deemed to have made a gift to the extent that the proportion of the total consideration furnished by the spouse, multiplied by the proceeds of the termination (whether in the form of cash, property, or interests in property), exceeds the value of the proceeds of termination received by the spouse. See section 2523(i), and §§ 25.2523(i)-1 and 25.2503-2(f) as to certain of the tax consequences that may result upon termination of the tenancy. In the case of tenancies to which this paragraph applies, if the creation of the tenancy was treated as a gift to the noncitizen donee spouse under section 2515(c) (in the case of tenancies created prior to 1982) or section 2511 (in the case of tenancies created after December 31, 1981 and before July 14,

1988), then, upon termination of the tenancy, for purposes of applying the principles of section 2515 and the regulations thereunder, the amount treated as a gift on creation of the tenancy is treated as consideration originally belonging to the noncitizen spouse and never acquired by the noncitizen spouse from the donor spouse. This paragraph (b)(2)(ii) applies to tenancies created after December 31, 1954, and before January 1, 1982, subject to an election under section 2515(c), and to tenancies created after December 31, 1981, and before July 14, 1988.

(3) *Miscellaneous provisions*—(i) *Tenancy by the entirety.* For purposes of this section, *tenancy by the entirety* includes a joint tenancy between husband and wife with right of survivorship.

(ii) *No election to treat as gift.* The regulations under section 2515 that relate to the election to treat the creation of a tenancy by the entirety as constituting a gift and the consequences of such an election upon termination of the tenancy (§§ 25.2515-2 and 25.2515-4) do not apply for purposes of section 2523(i)(3).

(4) *Examples.* The application of this section may be illustrated by the following examples:

*Example 1.* In 1992, A, a United States citizen, furnished \$200,000 and A's spouse B, a resident alien, furnished \$50,000 for the purchase and subsequent improvement of real property held by them as tenants by the entirety. The property is sold in 1998 for \$300,000. A receives \$225,000 and B receives \$75,000 of the sales proceeds. The termination results in a gift of \$15,000 by A to B, computed as follows:

$$\frac{\$200,000}{\$250,000} \times \$300,000 \text{ (proceeds of termination)} = \$240,000$$

(total consideration furnished by both spouses)      (Proceeds of termination attributable to A.)

\$240,000 - \$225,000 (proceeds received by A) = \$15,000 gift by A to B.

*Example 2.* In 1986, A purchased real property for \$300,000 and took title in the names of A and B, A's spouse, as joint tenants. Under section 2511 and § 25.2511-1(h)(1) of the

regulations, A was treated as making a gift of one-half of the value of the property (\$150,000) to B. In 1995, the real property is sold for \$400,000 and B receives the entire proceeds of sale. For purposes of determining the amount of the gift on termination of the

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tenancy under the principles of section 2515 and the regulations thereunder, the amount treated as a gift to *B* on creation of the tenancy under section 2511 is treated as *B*'s con-

tribution towards the purchase of the property. Accordingly, the termination of the tenancy results in a gift of \$200,000 from *A* to *B* determined as follows:

$$\frac{\$150,000 \text{ (consideration furnished by A)}}{\$300,000 \text{ (total consideration deemed furnished by both spouses)}} \times \$400,000 \text{ (proceeds of termination)} = \$200,000 \text{ (Proceeds of termination attributable to A.)}$$

\$200,000-0 (proceeds received by *A*)=\$200,000 gift by *A* to *B*.

(c) *Tenancies by the entirety in personal property where one spouse is not a United States citizen*—(1) *In general.* In the case of the creation (either by one spouse alone or by both spouses where at least one of the spouses is not a United States citizen) of a joint interest in personal property with right of survivorship, or additions to the value thereof in the form of improvements, reductions in the indebtedness thereof, or otherwise, the retained interest of each spouse, solely for purposes of determining whether there has been a gift by the donor to the spouse who is not a citizen of the United States at the time of the gift, is treated as one-half of the value of the joint interest. See section 2523(i) and §§ 25.2523(i)-1 and 25.2503-2(f) as to certain of the tax consequences that may result upon creation and termination of the tenancy.

(2) *Exception.* The rule provided in paragraph (c)(1) of this section does not apply with respect to any joint interest in property if the fair market value of the interest in property (determined as if each spouse had a right to sever) cannot reasonably be ascertained except by reference to the life expectancy of one or both spouses. In these cases, actuarial principles may need to be resorted to in determining the gift tax consequences of the transaction.

[T.D. 8612, 60 FR 43553, Aug. 22, 1995]

**§ 25.2523(i)-3 Effective date.**

The provisions of §§ 25.2523(i)-1 and 25.2523(i)-2 are effective in the case of gifts made after August 22, 1995.

[T.D. 8612, 60 FR 43554, Aug. 22, 1995]

**§ 25.2524-1 Extent of deductions.**

Under the provisions of section 2524, the charitable deduction provided for in section 2522 and the marital deduction provided for in section 2523 are allowable only to the extent that the gifts, with respect to which those deductions are authorized, are included in the "total amount of gifts" made during the "calendar period" (as defined in § 25.2502-1(c)(1)), computed as provided in section 2503 and § 25.2503-1 (i.e., the total gifts less exclusions). The following examples (in both of which it is assumed that the donor has previously utilized his entire \$30,000 specific exemption provided by section 2521, which was in effect at the time) illustrate the application of the provisions of this section:

*Example (1).* A donor made transfers by gift to his spouse of \$5,000 cash on January 1, 1971, and \$1,000 cash on April 5, 1971. The donor made no other transfers during 1971. The first \$3,000 of such gifts for the calendar year is excluded under the provisions of section 2503(b) in determining the "total amount of gifts" made during the first calendar quarter of 1971. The marital deduction for the first calendar quarter of \$2,500 (one-half of \$5,000) otherwise allowable is limited by section 2524 to \$2,000. The amount of taxable gifts is zero (\$5,000-\$3,000 (annual exclusion) -\$2,000 (marital deduction)). For the second calendar quarter of 1971, the marital deduction is \$500 (one-half of \$1,000); the amount excluded under section 2503(b) is zero because the entire \$3,000 annual exclusion was applied against the gift in the first calendar quarter of 1971; and the amount of taxable gifts is \$500 (\$1,000-\$500 (marital deduction)).

*Example (2).* The only gifts made by a donor to his spouse during calendar year 1969 were a gift of \$2,400 in May and a gift of \$3,000 in August. The first \$3,000 of such gifts is excluded under the provisions of section 2503(b) in determining the "total amount of gifts"