§ 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
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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:

\[ \frac{\$200,000}{\$250,000} \times \$300,000 = \$240,000 \]

(Proceeds of termination attributable to A.)

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 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 contribution 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:

\[ \frac{\$150,000}{\$300,000} \times \$400,000 = \$200,000 \]

(Proceeds of termination attributable to A.)
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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]

§ 25.2523(f)–1A Special rule applicable to community property transferred prior to January 1, 1982.

(a) In general. With respect to gifts made prior to January 1, 1982, the marital deduction is allowable with respect to any transfer by a donor to the donor’s spouse only to the extent that the transfer is shown to represent a gift of property that was not, at the time of the gift, held as community property, as defined in paragraph (b) of this section. The burden of establishing the extent to which a transfer represents a gift of property not so held rests upon the donor.

(b) Definition of “community property.”

(1) For the purpose of paragraph (a) of this section, the term “community property” is considered to include—

(i) Any property held by the donor and his spouse as community property under the law of any State, Territory, or possession of the United States, or of any foreign country, except property in which the donee spouse had at the time of the gift merely an expectant interest. The donee spouse is regarded...