

§ 20.2038-1

26 CFR Ch. I (4-1-07 Edition)

by the express terms of the instrument of transfer and not by operation of law.

(g) *Transfers made after November 11, 1935, and before January 29, 1940.* The provisions of paragraphs (a) to (f) of this section are fully applicable to transfers made after November 11, 1935 (the date on which the Supreme Court decided *Helvering v. St. Louis Union Trust Co.* (296 U.S. 39) and *Becker v. St. Louis Union Trust Co.* (296 U.S. 48)), and before January 29, 1940 (the date on which the Supreme Court decided *Helvering v. Hallock* and companion cases (309 U.S. 106)), except that the value of an interest in property transferred between these dates is not included in a decedent's gross estate under section 2037 if—

(1) The Commissioner, whose determination shall be final, determines that the transfer is classifiable with the transfers involved in the *St. Louis Union Trust Co.* cases, rather than with the transfer involved in the case of *Klein v. United States* (283 U.S. 231), previously decided by the Supreme Court, and

(2) The transfer shall have been finally treated for all gift tax purposes, both as to the calendar year of the transfer and as to subsequent calendar years, as a gift in an amount measured by the value of the property undiminished by reason of a provision in the instrument of transfer by which the property, in whole or in part, is to revert to the decedent should he survive the donee or another person, or the reversion is conditioned upon some other contingency terminable by the decedent's death.

**§ 20.2038-1 Revocable transfers.**

(a) *In general.* A decedent's gross estate includes under section 2038 the value of any interest in property transferred by the decedent, whether in trust or otherwise, if the enjoyment of the interest was subject at the date of the decedent's death to any change through the exercise of a power by the decedent to alter, amend, revoke, or terminate, or if the decedent relinquished such a power in contemplation of death. However, section 2038 does not apply—

(1) To the extent that the transfer was for an adequate and full consider-

ation in money or money's worth (see § 20.2043-1);

(2) If the decedent's power could be exercised only with the consent of all parties having an interest (vested or contingent) in the transferred property, and if the power adds nothing to the rights of the parties under local law; or

(3) To a power held solely by a person other than the decedent. But, for example, if the decedent had the unrestricted power to remove or discharge a trustee at any time and appoint himself trustee, the decedent is considered as having the powers of the trustee. However, this result would not follow if he only had the power to appoint himself trustee under limited conditions which did not exist at the time of his death. (See last two sentences of paragraph (b) of this section.)

Except as provided in this paragraph, it is immaterial in what capacity the power was exercisable by the decedent or by another person or persons in conjunction with the decedent; whether the power was exercisable alone or only in conjunction with another person or persons, whether or not having an adverse interest (unless the transfer was made before June 2, 1924; see paragraph (d) of this section); and at what time or from what source the decedent acquired his power (unless the transfer was made before June 23, 1936; see paragraph (c) of this section). Section 2038 is applicable to any power affecting the time or manner of enjoyment of property or its income, even though the identity of the beneficiary is not affected. For example, section 2038 is applicable to a power reserved by the grantor of a trust to accumulate income or distribute it to A, and to distribute corpus to A, even though the remainder is vested in A or his estate, and no other person has any beneficial interest in the trust. However, only the value of an interest in property subject to a power to which section 2038 applies is included in the decedent's gross estate under section 2038.

(b) *Date of existence of power.* A power to alter, amend, revoke, or terminate will be considered to have existed at the date of the decedent's death even though the exercise of the power was subject to a precedent giving of notice

or even though the alteration, amendment, revocation, or termination would have taken effect only on the expiration of a stated period after the exercise of the power, whether or not on or before the date of the decedent's death notice had been given or the power had been exercised. In determining the value of the gross estate in such cases, the full value of the property transferred subject to the power is discounted for the period required to elapse between the date of the decedent's death and the date upon which the alteration, amendment, revocation, or termination could take effect. In this connection, see especially § 20.2031-7. However, section 2038 is not applicable to a power the exercise of which was subject to a contingency beyond the decedent's control which did not occur before his death (e.g., the death of another person during the decedent's life). See, however, section 2036(a)(2) for the inclusion of property in the decedent's gross estate on account of such a power.

(c) *Transfers made before June 23, 1936.* Notwithstanding anything to the contrary in paragraphs (a) and (b) of this section, the value of an interest in property transferred by a decedent before June 23, 1936, is not included in his gross estate under section 2038 unless the power to alter, amend, revoke, or terminate was reserved at the time of the transfer. For purposes of this paragraph, the phrase "reserved at the time of the transfer" has reference to a power (arising either by the express terms of the instrument of transfer or by operation of law) to which the transfer was subject when made and which continued to the date of the decedent's death (see paragraph (b) of this section) to be exercisable by the decedent alone or by the decedent in conjunction with any other person or persons. The phrase also has reference to any understanding, express or implied, had in connection with the making of the transfer that the power would later be created or conferred.

(d) *Transfers made before June 2, 1924.* Notwithstanding anything to the contrary in paragraphs (a) to (c) of this section, if an interest in property was transferred by a decedent before the enactment of the Revenue Act of 1924,

(June 2, 1924, 4:01 p.m., eastern standard time), and if a power reserved by the decedent to alter, amend, revoke, or terminate was exercisable by the decedent only in conjunction with a person having a substantial adverse interest in the transferred property, or in conjunction with several persons some or all of whom held such an adverse interest, there is included in the decedent's gross estate only the value of any interest or interests held by a person or persons not required to joint in the exercise of the power plus the value of any insubstantial adverse interest or interests of a person or persons required to join in the exercise of the power.

(e) *Powers relinquished in contemplation of death—(1) In general.* If a power to alter, amend, revoke, or terminate would have resulted in the inclusion of an interest in property in a decedent's gross estate under section 2038 if it had been held until the decedent's death, the relinquishment of the power in contemplation of the decedent's death within 3 years before his death results in the inclusion of the same interest in property in the decedent's gross estate, except to the extent that the power was relinquished for an adequate and full consideration in money or money's worth (see § 20.2043-1). For the meaning of the phrase "in contemplation of death", see paragraph (c) of § 20.2035-1.

(2) *Transfers before June 23, 1936.* In the case of a transfer made before June 23, 1936, section 2038 applies only to a relinquishment made by the decedent. However, in the case of a transfer made after June 22, 1936, section 2038 also applies to a relinquishment made by a person or persons holding the power in conjunction with the decedent, if the relinquishment was made in contemplation of the decedent's death and had the effect of extinguishing the power.

(f) *Effect of disability to relinquish power in certain cases.* Notwithstanding anything to the contrary in paragraphs (a) through (e) of this section the provisions of this section do not apply to a transfer if—

(1) The relinquishment on or after January 1, 1940, and on or before December 31, 1947, of the power would, by

reason of section 1000(e), of the Internal Revenue Code of 1939, be deemed not a transfer of property for the purpose of the gift tax under chapter 4 of the Internal Revenue Code of 1939, and

(2) The decedent was, for a continuous period beginning on or before September 30, 1947, and ending with his death, after August 16, 1954, under a mental disability to relinquish a power.

For the purpose of the foregoing provision, the term “mental disability” means mental incompetence, in fact, to release the power whether or not there was an adjudication of incompetence. Such provision shall apply even though a guardian could have released the power for the decedent. No interest shall be allowed or paid on any overpayment allowable under section 2038(c) with respect to amounts paid before August 7, 1959.

[T.D. 6296, 23 FR 4529, June 24, 1958, as amended by T.D. 6600, 27 FR 4985, May 29, 1962]

#### § 20.2039-1 Annuities.

(a) *In general.* A decedent’s gross estate includes under section 2039 (a) and (b) the value of an annuity or other payment receivable by any beneficiary by reason of surviving the decedent under certain agreements or plans to the extent that the value of the annuity or other payment is attributable to contributions made by the decedent or his employer. Section 2039 (a) and (b), however, has no application to an amount which constitutes the proceeds of insurance under a policy on the decedent’s life. Paragraph (b) of this section describes the agreements or plans to which section 2039 (a) and (b) applies; paragraph (c) of this section provides rules for determining the amount includible in the decedent’s gross estate; and paragraph (d) of this section distinguishes proceeds of life insurance. The fact that an annuity or other payment is not includible in a decedent’s gross estate under section 2039 (a) and (b) does not mean that it is not includible under some other section of Part III of Subchapter A of Chapter 11. However, see section 2039 (c) and (d) and § 20.2039-2 for rules relating to the exclusion from a decedent’s gross es-

tate of annuities and other payments under certain “qualified plans”.

(b) *Agreements or plans to which section 2039 (a) and (b) applies.* (1) Section 2039 (a) and (b) applies to the value of an annuity or other payment receivable by any beneficiary under any form of contract or agreement entered into after March 3, 1931, under which—

(i) An annuity or other payment was payable to the decedent, either alone or in conjunction with another person or persons, for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death, or

(ii) The decedent possessed, for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death, the right to receive such an annuity or other payment, either alone or in conjunction with another person or persons.

The term “annuity or other payment” as used with respect to both the decedent and the beneficiary has reference to one or more payments extending over any period of time. The payments may be equal or unequal, conditional or unconditional, periodic or sporadic. The term “contract or agreement” includes any arrangement, understanding or plan, or any combination of arrangements, understandings or plans arising by reason of the decedent’s employment. An annuity or other payment “was payable” to the decedent if, at the time of his death, the decedent was in fact receiving an annuity or other payment, whether or not he had an enforceable right to have payments continued. The decedent “possessed the right to receive” an annuity or other payment if, immediately before his death, the decedent had an enforceable right to receive payments at some time in the future, whether or not, at the time of his death, he had a present right to receive payments. In connection with the preceding sentence, the decedent will be regarded as having had “an enforceable right to receive payments at some time in the future” so long as he had complied with his obligations under the contract or agreement up to the time of his death. For the meaning of the phrase “for his life or for any period not ascertainable