

INTERNAL REVENUE SERVICE  
NATIONAL OFFICE TECHNICAL ADVICE MEMORANDUM

Index (UIL) No.: 2502.01-01; 2505.01-00; 2505.04-00

CASE MIS No.: TAM-120262-98

Date: April 29, 1999

CC:DOM:P&SI:B4

Number: **199930002**

Release Date: 7/30/1999

LEGEND:

Taxpayer:

Date:

Year 1:

Year 2:

Amount 1:

Amount 2:

ISSUE:

What is the amount of the Taxpayer's available unified credit to be applied with respect to unreported gifts made in a prior taxable year where the Taxpayer utilized almost the entire unified credit allowable in determining the gift tax liability with respect to gifts made in a subsequent taxable year, and the statute of limitations with respect to the subsequent year is closed?

**CONCLUSION:**

Taxpayer's available unified credit must be reduced to reflect use of the credit with respect to the subsequent year.

**FACTS:**

Taxpayer died on Date. During Taxpayer's lifetime, Taxpayer made gifts in Year 2 of Amount 1 that were reported on a timely filed gift tax return. No gift tax was due after application of the unified credit under § 2505. The transfers in Year 2 utilized almost the entire amount of the unified credit available to Taxpayer. The statute of limitations for assessment of tax on the Year 2 gifts has expired. During the course of the estate tax examination, it was discovered that in Year 1, Taxpayer entered into a transaction with his children pursuant to which Taxpayer purportedly sold real estate valued at Amount 2 to his children for adequate consideration in money or money's worth. No gift tax return was filed reporting the transaction in Year 1. It is contended that this transaction is properly characterized as a gift subject to gift tax in Year 1. See, Estate of Maxwell v. Commissioner, 3 F.3d 591 (2d Cir. 1993); Rev. Rul. 77-299, 1977-2 C.B. 343. Taxpayer has not agreed with this characterization.

**LAW AND ANALYSIS:**

Section 2501 imposes a tax for each calendar year on the transfer of property by gift during such calendar year by any individual. Under § 2502, the tax imposed by § 2501 for each calendar year shall be an amount equal to the excess of (1) a tentative tax, computed under § 2001(c), on the aggregate sum of the taxable gifts for such calendar year and for each of the preceding calendar periods, over (2) a tentative tax, computed under such section, on the aggregate sum of the taxable gifts for each of the preceding calendar periods.

Prior to amendment by the Taxpayer Relief Act of 1997, § 2505(a) provided that there shall be allowed as a credit against the tax imposed by § 2501, an amount equal to \$192,800, reduced by the sum of the amounts allowable as a credit to the individual under § 2505 for all preceding calendar periods.

Rev. Rul. 79-398, 1979-2 C.B. 388, provides that the unified credit provided in § 2505 is mandatory and the donor's available unified credit must be used in computing the net gift tax liability.

Under the doctrine of duty of consistency, taxpayers are required to maintain a certain fidelity in their representations and reports to the Internal Revenue Service. In certain circumstances, courts will not allow a taxpayer to take a position in one year that is at odds with a position taken in an earlier year. The duty of consistency applies if:

(1) a taxpayer made a representation of fact; (2) the Commissioner acquiesced in or relied on that representation; and (3) the taxpayer makes a contrary representation, after it is too late to correct the effect of the first representation. See Herrington v. Commissioner, 854 F.2d 755, 758 (5<sup>th</sup> Cir. 1988); Estate of Letts v. Commissioner, 109 T.C. 290, 297 (1997). In Estate of Letts, the court concluded that in determining whether the duty applies, the Commissioner acquiesces in or relies on a fact if a taxpayer files a return that contains an inadequately disclosed item of which the Commissioner was not otherwise aware, the Commissioner accepts that return, and the time to assess tax expires without an audit of that return.

In the instant case, under the statutory scheme, Taxpayer is not entitled to a total unified credit for lifetime transfers in excess of the amount provided by § 2505. Provided it is determined, either by a court or as a result of the administrative process, that the Year 1 transaction constituted a gift subject to gift tax in Year 1,<sup>1</sup> Taxpayer was obligated to report the gift and to utilize the unified credit in Year 1. By claiming the unified credit with respect to the Year 2 gifts, Taxpayer represented that Taxpayer had not made any prior gifts and that Taxpayer still had his entire unified credit available. The Service relied on this representation in allowing the use of the unified credit for the Year 2 gifts, with respect to which the statute of limitations has now expired. In allowing the application of the unified credit in Year 2, the Commissioner was not provided with any facts or information by Taxpayer that would disclose the Year 1 transaction. The Commissioner may rely on the correctness of a return or report by Taxpayer that is given to the Commissioner under penalty of perjury. Assuming that it is determined, by a court or otherwise, that Taxpayer made a gift in Year 1, the determination would constitute a contrary representation regarding the Year 2 transaction. Taxpayer is precluded from contradicting the previous representation and it is not necessary that there be a finding of intentional misrepresentation by Taxpayer. Accordingly, Taxpayer would be estopped from now arguing that Taxpayer has available the entire unified credit allowable for application against the Year 1 gift tax liability. Any other result would conflict with the clear statutory intent of § 2505(a), limiting to \$192,800, the total available unified credit that can be claimed with respect to lifetime transfers.

#### CAVEAT(S)

A copy of this technical advice memorandum is to be given to the taxpayer(s). Section 6110(j)(3) of the Code provides that it may not be used or cited as precedent.

---

<sup>1</sup>This technical advice memorandum does not address the issue of whether there was a gift in Year 1.