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The Expatriation Rules of the Heroes Earnings Assistance and Relief Tax Act of 2008

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The United States is unique among developed countries in that it taxes its citizens on a world-wide basis wherever they are resident. To avoid being taxed, U.S. citizens who live outside of the United States have an incentive to give up their citizenship. The United States also taxes persons who are resident in the United States on their world-wide income.[1] Residents of the United States for tax purposes include legal permanent residents ("Green Card" holders), even if living abroad[2] and other aliens who have had a substantial presence in the United States.[3] Most other developed countries tax persons resident or domiciled in the particular country.

The United States has laws that make it difficult for citizens and long-term residents to escape the U.S. tax system for 10 years after expatriation.[4] After that time the expatriate is no longer subject to special U.S. tax rules. However, a taxpayer could expatriate owing assets with substantial accrued gains and avoid being taxed on those gains. Congress has decided to strengthen the expatriation rules to include a deemed disposition of assets in the year of expatriation. [5]

The Heroes Earnings Assistance and Relief Tax Act of 2008 (the "Heroes Act") was signed by President George W. Bush on June 17, 2008.[6] It provides a number of tax provisions to help military families. However, to help pay for the relief to the military families, the Heroes Act amended substantially the laws for persons expatriating from the United States.[7] The new law added a "departure" tax for U.S. citizens giving up their U.S. citizenship and for long term permanent residents giving up their U.S. residency status. The new rules replace the former (10 years of

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taxation) rules with a deemed disposition of assets held immediately before expatriation.

Income Tax Provisions for Expatriates

Rules Applicable to Taxpayers Expatriating Prior to the Enactment of the Heroes Earning Assistance and Relief Act (June 17, 2008)

The law in effect prior to the enactment of the Heroes Act made it difficult for citizens[8] and long term residents[9] to escape from the U.S. income and estate tax systems for 10 years after expatriation by taxing most U.S. sourced income or transfer of U.S. situs assets.[10] If the expatriate spent more that 30 days in the United States in any tax year during that time, he was taxed on this worldwide income for that year,[11] whereas, if the expatriate was in the U.S. for 30 days or less, he was taxed on his U.S. source income (as expanded). The expanded U.S. source income included gains on the sale of personal property located in the United States and gains on the sale or exchange of stock or securities issued by U.S. corporations.[12] If, within the 15-year period beginning five years before the expatriation and ending 10 years after the expatriation, the expatriate exchanged property that had produced U.S. source income for property that produced foreign source income in a transaction that would otherwise have been entitled to nonrecognition treatment, the non-recognition treatment would have been ignored and any gain would have been recognized.[13] If the disposition had occurred in the five years preceding expatriation then the gain was to be recognized at the time of the loss of citizenship.[14] If the disposition occurred in the ten years following expatriation, the gain was recognized and taxed in the year of disposition.[15] The income and asset level for being subjected to the expatriation rules were similar to those of the new rules (see below). The former rules only applied if there was a tax avoidance motive for the expatriation.[16] There was a rebuttable presumption that expatriation was tax motivated. There is no such tax avoidance motive for the new rules to apply.

> The new law added a "departure" tax for U.S. citizens giving up their U.S. citizenship and for long term permanent residents giving up their U.S. residency status.

Basis of Taxation and Expatriation

The Heroes Act replaces the former rules with a requirement that the expatriating taxpayer has a deemed disposition of his assets at the time of expatriation.[17] Since the new rules can apply to former U.S. citizens, the date of expatriation is important in establishing if the new or old rules apply to a taxpayer. That date is determined by immigration law.[18]

The new rules also apply to citizens[19] and long term residents.[20] A long-term resident is a taxpayer who is a legal permanent resident for at least eight tax years out the 15 tax years ending with the tax year of losing his permanent residency status. A legal permanent resident, who is treated as a resident of a foreign country under that country's double-tax treaty with the United States and who does not waive the treaty rights pertaining to such a resident for a particular year, is not regarded as a legal permanent resident for that particular year when calculating whether he is a long-term resident.[21] If such a taxpayer *did* waive his treaty rights in any year, then that year would count as a year of legal permanent residence. A long-term resident expatriates when he is no longer regarded as being a resident of the United States. This is usually the date he abandons his green card voluntarily or is administratively determined to have abandoned his green card.[22]

Deemed Disposition

The Heroes Act labels the deemed disposition as "mark to market." In effect, the accrued (unrealized) gains and losses are deemed realized and recognized. The normal provisions of the Internal Revenue Code (the "Code"), such as the netting of gains and losses, will apply to the deemed sales. An exception is that the "wash sales" provisions, which generally deny the recognition of losses if the same asset is sold and purchased within a 30-day period before or after the sale, will not apply.[23] This makes sense as the deemed sale and immediate repurchase is required by the new law.

The U.S. rules state that only a net gain from the deemed sale, that exceeds $600,000, is added to income.[24] The figure of $600,000 will be adjusted for inflation in years after 2008.[25] This threshold pertains to each taxpayer, thus for a married couple filing jointly the figure would be $1.2 million (if both expatriate). It would appear that the basis of the asset, after the deemed sale, would be the deemed repurchase price without regard to the $600,000 threshold.[26] This step-up in basis only applies where the asset has been subject to the deemed disposition rules.

If instead of a net gain, after the netting process, a net capital loss is incurred then the ability to use that loss is still limited by the normal loss deduction rules. For individuals, net capital losses can only be used against future capital gains, except for a maximum of $3,000 (per year) that can be deducted from all other income.[27]

Basis of Assets

The new rule adds a special rule that the basis of an asset (which is deemed to be sold) that was held by the taxpayer when that person became a U.S. resident is stepped-up to the fair market value at the time that taxpayer became a U.S. resident. This rule means that any gain that accrued on the asset prior to the taxpayer becoming an U.S. resident would not be taxed under the "mark to market" rules. This provision is just a step-up in basis rather than a deemed disposition and repurchase of the asset at fair market value, as the law states that the asset "shall be treated as having a basis of not less than the fair market value … on such date."[28] This step-up in basis is a departure from the usual rules for the United States. Generally, the basis of an asset is the cost even if held at the time the taxpayer became a U.S. resident, thus, bringing in any gain accrued prior to being a U.S. resident under U.S. taxation.

Expatriates

The U.S. rules apply only to relatively wealthy taxpayers. "Covered expatriates" include U.S. citizens who give up their citizenship and long-term residents who lose their residency status. These persons also have to meet one of three main tests. The tests are the same as in the superceded law: the "average tax liability" test, the "net worth" test and the "noncertification" test. The "average tax liability" test applies to taxpayers who have had an average annual tax liability of $139,000 (in 2008)[29] in the five years ending in the year prior to expatriation; the "net worth" test applies to taxpayers who have $2 million or more in net assets at the date of expatriation; the "noncertification" test is where the taxpayer has not certified (under penalties of perjury) that he has complied with all of his federal U.S. tax requirements for the preceding five years or fails to provide evidence of such compliance as the Secretary may require.[30] The "average tax liability test" and the "net worth test" do not apply if (1) the taxpayer was a dual citizen of the United States and foreign country at birth,[31] continues to be a citizen of that foreign country and is taxed by that country as a resident, and (2) had been a resident of the U.S. for not more that 10 tax years in the 15 tax years ending with the tax year in which expatriation occurs. Those two tests ("average tax liability" and "net worth") do not apply also in the case of a taxpayer giving up his U.S. citizenship before the age of 18 1/2, again not having been a resident of the U.S. for more than 10 tax years in the 15 tax years ending with the tax year in which expatriation occurs.

Excluded Property

The new U.S. rules have exemptions to the "mark to market" provisions. There are three categories of exempt property; deferred compensation items, specified tax deferred accounts and interests in nongrantor trusts.[32]

Deferred compensation items include[33]:

a) employee pensions plans (including, stock bonus, pension and profit sharing plans)[34]; pension annuities[35]; government pension plans, simplified employee pension plans,[36] or simplified retirement accounts,[37]
b) foreign pension plans or similar retirement arrangements,
c) deferred compensation, and
d) property that the taxpayer is entitled to receive due to performance of services and not previously brought into income.[38]

The treatment of these deferred compensation items differs depending on whether that item can be classified as an "eligible deferred compensation item" or not. For the deferred compensation to be "eligible," the person paying amounts under that deferred compensation plan must be a U.S. person or elect to be treated as a U.S. person (under any requirements of the IRS) and the expatriate must notify the payor of his status (as a covered expatriate).[39] The expatriate also has to make an irrevocable waiver of any treaty rights with respect to that item.[40] The rule for "eligible deferred compensation items" is that the payor must withhold 30 percent tax from the payment.[41] Since there is this withholding tax on the payments from these "eligible" compensation accounts, there is no deemed sale of the assets held in them.

If the deferred compensation plan is not regarded as "eligible" then the taxpayer is deemed to have received an amount equal to the present value of the accrued benefit (of the deferred plan) on the day before expatriation.[42] This could, of course, add substantial amounts to the taxpayer's ordinary income for that year. As the benefit is only deemed to be paid on the day before expatriation, any "additional tax" (usually 10 percent if the taxpayer is under 59 1/2 years old), that is normally payable due to early distribution, is not applicable.[43]

Special rules apply to "specified tax deferred accounts." Specified tax deferred accounts include individual retirement accounts,[44] qualified tuition plans,[45] Coverdell education savings plans,[46] health savings plans[47] and Archer Medical Savings Accounts.[48,49] Expatriating taxpayers holding these plans are treated as having received a distribution of the entire plan on the day before expatriation.[50] As in the case of the deferred compensation amounts, any penalty tax resulting from the deemed early distribution is not applicable.[51] Furthermore, when amounts are actually distributed from these deferred accounts appropriate adjustment would be made for the prior deemed distribution.[52] The new law does not specify what these adjustments would be.

The third category of excluded property is nongrantor trusts. For the rules to apply the expatriating taxpayer must have been a beneficiary of the trust on the day before expatriation.[53] In these cases, the "mark to market" rule will not apply. Instead, there is a 30 percent withholding tax on the taxable portion of any distribution to the expatriate.[54] The "taxable portion" of a distribution is the amount of that distribution that would have been includable in the expatriate's income if the expatriate had been subject to tax as a citizen or resident of the United States.[55] In addition, if the property distributed has an accrued gain (that is the fair market value is greater than its adjusted basis) the property is deemed to have been sold at its fair market value by the trust, to the beneficiary. The gain on the deemed sale is recognized by the trust.[56]

A grantor trust is not excluded property. Thus, the assets are deemed sold and repurchased by the trust under the "mark to market" rules, on the day before expatriation of the owner.[57] A grantor trust is a trust in which the grantor (generally the person who sets up the trust) retains some substantial rights in the trust.[58]

Election to Defer Payment

Since the deemed sale and repurchase do not result in any inward cash flow, the expatriating taxpayer may not have the funds to pay the extra tax. The new U.S. legislation permits an expatriating taxpayer to elect to postpone payment of the additional tax resulting from the application of the "mark to market" rules.[59] Payment is generally delayed until the due date of filing the return for the year in which the property is sold.[60] However, if the expatriate dies prior to selling the property, then the additional tax is due by the due date of filing the final return of the deceased person.

For the election to defer payment to apply, adequate security must be posted.[61] The security can be a bond (at a value that covers the tax and any interest due on the unpaid tax) that is furnished to, and accepted by, the IRS under the provisions of Code Sec. 6325.[62] Other security, such as a letter of credit, that meets the requirements of the Secretary may also be furnished.[63]

The election does have a cost. Interest is charged on the postponed tax at the rate for underpaid tax for individuals.[64] This interest rate runs from the due date of filing the return for the year of expatriation to the time the tax is actually paid. The interest rate is the same as that charged on any other underpayment of tax.

If the security posted for the deferral fails to meet the requisite tests (and the failure is not rectified within the time limit set out by the IRS) then again the additional tax has to be paid by the due date of the return for the year in which the failure occurs.[65] The election is made on a property-by-property basis and, once made, is irrevocable.[66] Furthermore, the taxpayer must agree to waive, irrevocably, any rights under a treaty with the United States that may preclude assessment or collection of the postponed tax.[67]

If several properties are held at the time of expatriation and only one is sold at a later date then the amount of additional tax relating to the sold property has to be determined. This is done by taking the same ratio of the additional tax due to the deemed sale in the year of expatriation as the ratio of deemed gain that the now sold asset had to the gains of all the assets subject to 'mark to market' rules.[68]

For example, if the expatriating taxpayer had two properties, A and B, subject to the "mark to market" rules. Property A has a gain of $20,000,000 and Property B has a gain of $30,000,000 and the additional tax is $6,900,000.[69] The ratio for any additional tax is 40 percent ($20M/$50M) for property A and 60 percent ($30M/$50M) for property B. If the election to defer payment is made and property A is sold five years later, the additional tax in that year would be $2,760,000 ($6,900,000 x 40%).

Deferring payment of the tax until the asset is sold would seem to be a likely strategy for many expatriating taxpayers. However, the cost is having to supply adequate security and the fact that interest accrues on the postponed tax.

Gifts and Bequests to a U.S. Citizen or Resident

The United States has a federal estate and gift tax regime, which can be quite onerous. The U.S. estate and gift tax does not apply to non-U.S. persons (other than those holding U.S. situs assets). Therefore it would be possible for a taxpayer to avoid gift or estate taxes by making the gift (or holding property until death) after he has become an expatriate. To counteract this possibility, the Heroes Act adds new provisions for U.S. citizens or residents receiving gifts from an expatriate or bequests from a deceased expatriate.[70] The tax on the gift or bequest is the highest estate tax rate (or the highest gift tax rate, if higher) times the value of the gift or bequest.[71] Since collecting tax from expatriates is difficult, it is the recipient of the gift or bequest who is liable for the tax.[72] The legislation refers to a "covered" gift or bequest. A "covered" gift or bequest is any property acquired, directly or indirectly, by gift from an expatriate, or by reason of the death of an individual who was an expatriate immediately before dying,[73]

> The Heroes Act has made expatriation potentially very expensive. Wealthy U.S. citizens and long-term residents need to consider the new rules carefully before deciding to avoid future U.S. tax by expatriating.

If the expatriate or estate of a deceased expatriate timely files a gift tax return or an estate tax return, any property included on those returns are not regarded as "covered" gifts and bequests.[74] Also excluded are transfers to charities or spouses that would otherwise be exempt from gift or estate taxes under the normal rules.[75] Furthermore, the annual per donor per donee gift tax exception will apply to "covered" gifts and bequests.[76] For example if the value of the gift is $20,000, tax would be charged on $7,000 (the amount that exceeds the exemption amount of $13,000).[77] Some foreign countries have their own estate (or gift) taxes. To alleviate any double taxation, the new law provides that if the expatriate or estate of a deceased expatriate pays any foreign tax on the gift or bequest that foreign tax will reduce the tax imposed by the new law on the donee or beneficiary.[78]

Instead of making a direct gift (or leaving a bequest) to a U.S. citizen or resident, the expatriate could transfer the property to a trust. The new law has provisions that address this kind of transfer. If the trust is a U.S. domestic trust then the same rules would apply to the trust as they would to an individual.[79] In this case, it is the trust that would be responsible for paying the tax rather than the beneficiaries.[80] If the trust is a foreign trust, then the new law cannot apply to the trust, but will apply to property that is distributed to a U.S. citizen or resident. The distributed property, whether from income or corpus, which is attributable to the "covered" gift or bequest, is treated as if it were a "covered" gift or bequest.[81] The U.S. citizen or resident would be the person liable for the tax as before. How much of the distribution would be attributable to the 'covered' gift or bequest is not specified by the new law. Presumably, regulations will be issued to indicate how to calculate the amount attributable.[82] If the distribution from the foreign trust is included in the U.S. citizen's or resident's gross income then a deduction for the tax paid, due to these new rules, can be deducted from the gross income.[83] A foreign trust can also elect to be treated as a domestic trust for the purposes of these rules. This election is revocable with permission of the IRS.[84] In this case, the foreign trust would pay the tax on any "covered" transfer to it.

Conclusion

U.S. legislators are concerned about taxpayers obtaining a tax advantage by removing themselves from the country's tax system. The Heroes Act requires a deemed disposition of most assets held at the time of expatriation rule for U.S. persons expatriating. There is no presumed tax avoidance motivation for application of the new rules. This solution of "mark to market" applies only to taxpayers with high income in the five years before expatriation and even then, only if the gain on the assets "marked to market" is substantial (over $626,000 in 2009). If a taxpayer is leaving the country permanently to a new life in another country, it is quite possible that he would choose to realize his gains by selling his assets before expatriating and using those funds to buy assets in the new country. This is more likely to be the case for expatriating long-term residents whose connections with the United States tend to be less strong than expatriating U.S. citizens.

If assets are left behind, and because of the cost, and possible hardship of having to pay tax on accrued but not realized gains, the new law permits the taxpayer to defer payment of the tax until the assets are sold, if security is posted. The rules include interest payable on the deferred tax liability. It is likely that many expatriating taxpayers would chose to defer paying the tax until after they have sold the assets to save their cash flows. Certain assets are exempt from the general deemed disposition rules. These exempt assets include those relating to deferred compensation such as pensions and retirement funds.

The United States is also concerned with expatriates circumventing the federal estate and gift tax by gifting or bequeathing assets after expatriating. The new rules require the recipients or beneficiaries to pay the estate tax. This may be more of a problem for expatriating U.S. citizens who are likely to have family (and other potential beneficiaries) still living in the United States (or are U.S. citizens) than for former long-term residents.

The Heroes Act has made expatriation potentially very expensive. Wealthy U.S. citizens and long-term residents need to consider the new rules carefully before deciding to avoid future U.S. tax by expatriating. However, if taxpayers have assets that have little or no accrued appreciation (or have most of their assets in cash), the cost of expatriating could be minimal or none. This could well be the case in the current economic climate. Taxpayers, whose assets have decreased in value and who wish to expatriate, may find it advantageous to expatriate before their asset values rebound

Once the U.S. taxpayer has expatriated, the expatriate can return for visits to the United States and not be concerned with the 30-day rule as he would have been under the former law. Overall, the new law is likely to have both winners and losers compared to the former law so taxpayers and their advisors need to consider all the circumstances to ascertain whether expatriation is beneficial.

Endnotes

1 Non-resident aliens are taxed on U.S. source income, either directly or through a withholding tax system, subject to any double tax agreements.

2 Code Sec. 7701(b)(1)(a)(i)

3 Code Sec. 7701(b)(3)(A). Substantial presence is defined as being in the U.S. for at least 183 days (calculated as all days in the current year plus one-third of the days in the prior year and one-sixth of the days in the pre-prior year). The taxpayer is required to have been in the U.S. at least 31 days in the current year.

4 Code Sec. 877(a).

5 Other countries that have a deemed disposition of assets on expatriation include Canada and Australia.

6 P.L. 110-245.

7 Heroes Act Sec. 301(a) adds Code Sec. 877A to the Internal Revenue Code.

8 Code Sec. 877(a).

9 Code Sec. 877(e)

10 Code Sec. 877(b), (d)

11 Code Sec. 877(g)(1)

12 Code Sec. 877(d)(1)

13 Code Sec. 877(d)(2)

14 Code Sec. 877(d)(2)(D)

15 Code Sec. 877(d)(2)(A) and Notice 97-19

16 Code Sec. 877(f)

17 Code Sec. 877(h).

18 Act Sec. 349(a)(5) of the Immigration and Nationality Act (I.N.A.) (8 U.S.C. §1481(a)(5) and Code Sec. 877A(g)(4). The date of expatriation for a former U.S. citizen is the earliest of:

- the date the taxpayer renounces his U.S. nationality in front of a U.S. diplomatic or consular official pursuant to the Immigration and Nationality Act,
- the date the taxpayer furnishes to the U.S. Department of State a signed statement voluntarily relinquishing his U.S. nationality by performing certain acts, [such as obtaining naturalization in a foreign state; taking an oath, affirmation or other formal declaration to a foreign state or its political subdivisions; entering or serving in the armed forces of a foreign state engaged in hostilities against the U.S. or serving as a commissioned or non-commissioned officer in the armed forces of a foreign state; or accepting employment with a foreign government if (a) one has the nationality of that foreign state or (b) an oath or declaration of allegiance is required in accepting the position. (I.N.A. §349 (a)(1),(2),(3) and (4). There is a presumption that a person performing any of these acts does NOT wish to relinquish his US citizenship. Only if the one of these acts are performed with the INTENTION of giving-up US citizenship, as evidence by the signed statement, is US citizenship relinquished.
- the date the U.S. Department of State issues to the taxpayer a certificate of loss of nationality, or
- the date a court in the U.S. cancels a naturalized citizen's certificate of naturalization.

The first two of the dates only apply if a court in the U.S. later confirms the relinquishment.

19 Code Sec. 877(a).

20 Code Sec. 877(e)

21 Code Sec. 877A(g)(5) referring to Code Sec. 877(e)(2).

22 Code Sec. 877A(g)(3)(B) referring to Code Sec. 7701(b)(6). A legal permanent resident can voluntarily abandon his permanent residency status by relinquishing his "green card" and completing and submitting Form I-407 to the U. S. authorities.

23 Code Sec. 877A (a)(2)(B) and Code Sec. 1097

24 Code Sec. 877A(a)(3)(A).

25 Code Sec. 877A(a)(3)(B). For 2009, the amount is $626,000. Rev. Proc 2008-66 IRB 2008-45.

26 Code Sec. 877A(a)(2)

27 Code Sec. 121(b)(1). This is limited to $1,500 for taxpayers filing Married Filing Separately.

28 Code Sec. 877A(h)(2). Declines in value are ignored.

29 This will be increased by inflation annually. For 2009, the amount is $145,000. Rev. Proc

ENDNOTES

2008-66 IRB 2008-45.

30 Code Sec. 877A(f) referring to Code Sec. 877(a)(2). Hereafter, the IRS will be used instead of the Secretary.

31 A person can become a dual citizen at birth in a number of ways depending on the laws of the countries involved. A common way is that a child is born in the U.S. (thus is a U.S. citizen) to foreign citizen parents. The laws of that foreign country make a child of its citizens also a citizen of that country. Thus the child will have dual citizenships (U.S. and the foreign country) from birth.

32 Code Sec. 877A (c)(1), (2) and (3)

33 Code Sec. 877(A)(d)(4)

34 Code Sec. 401(a)

35 Code Sec. 403(a) and (b)

36 Code Sec. 408(k)

37 Code Sec. 408(p)

38 Code Sec. 83. Usually such property would not have been included in income if there was a substantial risk of forfeiture, until that risk was removed.

39 Code Sec. 877A(d)((3)(A)

40 Code Sec. 877A(d)((3)(B)

41 Code Sec. 877A(d)((1)(A)

42 Code Sec. 877A(d)((2)(A)(i). If the property was subject to Code Sec. 83, the risk of forfeiture is deemed not to apply and so the right to receive the property is deemed to occur on the day before expatriation. Code Sec. 877A(d)((2)(A)(ii).

43 Code Sec. 877A(d)((2)(B).

44 As defined in Code Sec. 408(a) or (b) but excluding simplified employee pensions (Code Sec. 408(k)) or simplified retirement accounts (Code Sec. 408(p) – as these are included in the definition of deferred compensation items, see above.

45 As defined in Code Sec. 529.

46 As defined in Code Sec. 530.

47 As defined in Code Sec. 223.

48 As defined in Code Sec. 220.

49 Code Sec. 877A(e)(2).

50 Code Sec. 877A(e)(1)(A).

51 Code Sec. 877A(e)(1)(B)

52 Code Sec. 877A(e)(1)(C).

53 Code Sec. 877A(f)(5).

54 Code Sec. 877A(f)(1)(A)

55 Code Sec. 877A(f)(2).

56 Code Sec. 877A(f)(1)(B)

57 Joint Committee on Taxation Report JCX-44-08

58 Code Sec. 673-677 and Code Sec. 679.

59 Code Sec. 877A (b).

60 Code Sec. 877A (b)(1).

61 Code Sec. 877A (b)(4).

62 Code Sec. 877A (b)(4)(B)(i).

63 Code Sec. 877A (b)(4)(B)(ii).

64 Code Sec. 877A (b)(7).

65 Code Sec. 877A (b)(3).

66 Code Sec. 877A (b)(6).

67 Code Sec. 877A (b)(5).

68 Code Sec. 877A (b)(2).

69 $25M gain x 15% tax rate equals $7.5M. Less the $600,000 threshold gives additional tax of $6.9M.

70 Heroes Act Sec. 301(b) adds Code Sec. 2801.

71 Code Sec. 2801(a).

72 Code Sec. 2801(b).

73 Code Sec. 2801(e)(1).

74 Code Sec. 2801(e)(2).

75 Code Sec. 2801(e)(3) referring to Code Sec. 2055(estate charitable transfer), Code Sec. 2056 (estate spousal transfer), Code Sec. 2533 (gift charitable transfer) and Code Sec. 2523 (gift spousal transfer).

76 Code Sec/ 2801(c) and Code Sec. 2503(b).

77 $13,000 is the annual excluded amount for 2009. Code Sec. 2503(b).

78 Code Sec. 2801(d).

79 Code Sec. 2801(e)(4)(A)(i).

80 Code Sec. 2801(e)(4)(A)(ii).

81 Code Sec. 2801(e)(4)(B)(i).

82 Methods to do this could include; a) the distribution is first considered attributable to the gift or bequest, or b) a proportional amount of the distribution is so attributable (e.g. if 24 percent of the assets of the trust came from the 'covered' gift, then 24 percent of the distribution could be regarded as attributable).

83 Code Sec. 2801(e)(4)(B)(ii) and Code Sec. 164.

84 Code Sec. 2801(e)(4)(B)(iii).