

ESTATES, TRUSTS, & GIFTS

Regulations Shift Burden of Uncertain and Contested 2053 Claims and Expenses to Taxpayers

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Unless one of several exceptions to the new "actual payment" rule applies, an estate may find itself in the position of paying more estate tax upfront and then having to seek a refund when a deduction later meets the requirements of the new final Regulations. The rules allow post-death events to be taken into account.

[pg. 139]

New Regulations under [Section 2053](#) ([TD 9468](#), 10/20/09) provide comprehensive rules on issues affecting the estate tax deduction for administrative expenses and claims against the estate, effective for decedents dying after 10/19/09. ¹

[Section 2053](#) allows for deducting estate administration expenses and claims against the decedent's estate, among other deductible items. By definition, administration expenses occur after death. "Claims against the estate" relates to claims existing at death, but which often involve post-death events that determine the final amount due, especially if contingent or disputed. Since gross estate inclusions and deductions typically focus on the amount or value of such items on the date of death (or alternate valuation date), determining deductible amounts for administration expenses and claims gives rise to issues of how to integrate post-death events. This issue is further complicated when the final determination of such items is not made before the estate tax return is due. ²

The former Regulations under [Section 2053](#) acknowledged that deductions are allowed for claims and expenses even though the exact amount is not known, if such items are ascertainable with reasonable certainty and will be paid. ³ No deductions were allowed, however, based on vague or uncertain estimates. ⁴ Regarding claims, the law was (and is) uncertain as to the most basic question of whether post-death events can be considered at all in valuing the claim as of the date of death. ⁵

The 2009 Regulations intentionally adopt an interpretation that post-death events *are* to be considered. They also generally limit deductions for claims and expenses to amounts *actually paid* by the estate. ⁶ The 2009 Regulations acknowledge (as did the prior Regulations) that amounts not deductible at the time the estate tax return is filed can be later deducted, via a timely refund claim, when actually paid (or otherwise becoming deductible under the Regulations).

The new Regulations are commendable for attempting to provide guidance, certainty, and procedure for issues that are fraught with ambiguity and uncertainty. Nonetheless, for claims against an estate that cannot be paid before the due date of the estate tax payment, estates will initially have to pay taxes without benefit of a deduction (except to the extent that the claims come within an exception to the actual payment requirement). This can have a substantial adverse effect on the cash flow requirements of an estate. The ability to get a deduction *later* via a refund claim (with or without a protective refund claim if needed to keep the statute of limitations open) provides cold comfort for estates that may need to sell assets or otherwise position themselves so as to be

[pg. 140]

able to make an estate tax payment that ultimately may be refunded.

ACTUAL PAYMENT REQUIREMENT; EXCEPTIONS

The centerpiece of the 2009 Regulations is the threshold requirement that a claim or expense is deductible only to the extent it is *actually paid*.⁷ The requirement from the prior Regulations that the item be "ascertainable with reasonable certainty" is removed, presumably since actual payment serves the same function as that requirement.

The effect is that the estate has two options if it desires a deduction. It will either need to (1) pay the claim or expense before the estate tax return is filed, or (2) leave it off the return, pay estate taxes attributable to the unpaid deduction item, and then file a supplemental estate tax return later to take the deduction and seek a refund after the item is paid or otherwise becomes allowable.

Treasury is cognizant of the cash flow burden of this "pay tax now, seek a refund later when paid" approach. To ease the burden, the 2009 Regulations provide three exceptions to the actual payment requirement:

- (1) Reasonably ascertainable amounts.
- (2) Substantially related cross-claims and claims relating to estate assets.
- (3) Claims totaling not more than \$500,000.

Reasonably Ascertainable Amounts

The 2009 Regulations allow deductions for claims and expenses that are otherwise deductible but not yet paid, if "the amount to be paid is ascertainable with reasonable certainty and will be paid" (the "reasonably ascertainable amount exception").⁸ The Regulations expressly provide that calculable expenses such as executor's and attorney's fees come within this exception.⁹

The prior Regulations similarly allowed deductibility. New [Reg. 20.2053-1\(d\)\(4\)\(i\)](#) revises the standard by expressly excluding four items from using the reasonably ascertainable amount exception:

- Vague estimates.
- Uncertain estimates.
- Contested claims or expenses.
- Contingent claims or expenses.¹⁰

Post-death events are considered in applying the standard.¹¹ Thus, the 2009 Regulations expressly reject limiting the analysis to facts and circumstances existing on the date of death. If a claim or expense does not meet the standard when the return is filed, but later events give rise to the requisite reasonable certainty, the estate can later deduct the expense through a timely filed claim for refund.¹² Thus, the route to later deductibility through a refund claim is not limited to amounts that are later actually paid under the actual payment requirement, but also extends to unpaid amounts that later meet the reasonably ascertainable amount exception.

One type of expense or claim that benefits from this exception is a recurring payment obligation, which is due over time but after the estate tax return is due. The 2009 Regulations note that the decedent's obligation to make recurring payments on an enforceable and certain claim that otherwise is deductible under [Section 2042](#) is deductible under the reasonably ascertainable amount exception.¹³ The Proposed Regulations provided that the deduction had to be discounted using time value of money principles.¹⁴ This discounting requirement is absent from the 2009 Regulations (except for obligations contingent on death or remarriage, discussed below).

If a recurring payment obligation is contingent, vague, uncertain, or contested, then it can be deducted only when paid under the actual payment requirement.¹⁵ If the contingency relates to death or remarriage of the claimant, however, then the discounted value is deductible under the reasonably ascertainable amount exception.¹⁶

Also in regard to recurring payment obligations, the 2009 Regulations provide for deductibility of

[pg. 141]

amounts paid for an annuity. The deductible amount is equal to the sum of (1) the amount paid for the annuity (to the extent not refunded or expected to be refunded to the estate), (2) the amounts actually paid to the claimant by the estate before the annuity is purchased, and (3) amounts actually paid to the claimant by the estate in excess of the annuity.¹⁷ This applies to both contingent and noncontingent recurring obligations.¹⁸

Substantially Related Cross-Claims and Claims Relating to Estate Assets

Comments on the Proposed Regulations objected to the unfairness of requiring actual payment *from* the estate for a deduction, when related assets or claims *of* the estate are included in the gross estate without regard to actual payment to or retention by the estate. That is, a more stringent standard was being imposed for deductibility than for includability on related items. New [Reg. 20.2053-4\(b\)](#) provides relief in response to these comments.

This exception to the actual payment requirement applies to two types of unpaid claims. The first is a claim against an estate in the same or a substantially related matter involving a claim or cause of action that is included in the gross estate.¹⁹ The second is a claim against the estate that is integrally related to an asset included in the gross estate.²⁰

Such claims can be deducted without actual payment if the following requirements in [Reg. 20.2053-4\(b\)\(1\)](#) are met:

- (1) It otherwise meets [Section 2053](#) deductibility.
- (2) It is a personal obligation of the decedent existing at death.
- (3) It is enforceable against the estate (including at the time of payment).
- (4) A "qualified appraiser" determines the value of the claim by "qualified appraisal."²¹
- (5) The claim value is subject to adjustment for post-death events.
- (6) The aggregate value of the related claims or assets included in the decedent's gross estate exceeds 10% of the decedent's gross estate.

This exception will be of benefit only for significant claims—smaller claims will not pass the 10% threshold. The deduction is limited to the value of the related claim or asset included in the gross estate.

Practitioners may be hesitant to obtain a qualified appraisal for fear it may be used against them in any litigation involving the claim. Therefore, it is questionable how often this exception will be used in practice in lieu of filing a protective refund claim pending resolution of the claim.

If, before the expiration of the claim for refund period, the claim is paid or becomes deductible under the reasonably ascertainable amount exception discussed above, the deduction taken under this exception is subject to adjustment to the revised amount paid or determined.²² Further, the deduction may be adjusted to "current valuation" reflecting post-death events at any time before the expiration of the refund claim period, even if not yet paid or deductible under the reasonably ascertainable amount exception.²³ These adjustments can be made by the IRS. The 2009 Regulations are silent, however, regarding whether the estate must make these adjustments of its own accord on a supplemental return, making it unlikely that the estate is so obligated.

Claims Totaling Not More than \$500,000

The 2009 Regulations provide a de minimis exception to the actual payment requirement, which will be of substantial benefit to many estates. Under [Reg. 20.2053-4\(c\)](#), up to \$500,000 in claims may be deducted without payment if, as to each deducted claim, all of the following requirements are met:

- (1) It otherwise meets [Section 2053](#) deductibility.
- (2) It is a personal obligation of the decedent existing at death.
- (3) It is enforceable against the estate (including at the time of payment).

- (4) A "qualified appraiser" determines the value of the claim by "qualified appraisal." [24](#)
 (5) The claim value is subject to adjustment for post-death events.

As discussed for the preceding exception, executors may be hesitant to obtain an appraisal for these purposes since it may be used against them in litigation involving a claim.

If the total value of a claim is more than \$500,000, the exception cannot be used on that claim, even in part—although only the portions of the claim that are not otherwise deductible are counted for this purpose. [25](#) If there are multiple claims that have not been paid and they exceed \$500,000 in total, the estate can pick and choose among them to apply the exception to claims whose total does not exceed \$500,000. [26](#)

The deducted amounts are subject to the same post-return filing adjustments as described for the
 [pg. 142]

exception for substantially related cross-claims and claims relating to estate assets, discussed above. [27](#)

DUTY TO REPORT WHEN DEDUCTED ITEMS ARE NOT PAID

The Proposed Regulations provided an affirmative duty on the executor to advise the IRS if deducted claims or expenses were not in fact paid. These provisions were excluded from the 2009 Regulations. The Preamble to [TD 9468](#) notes that the Proposed Regulations never intended to impose this duty beyond the limitations period on assessments, but it makes no express provision as to whether there is or is not a duty to make notification when it is known that items will not be paid within the period for assessment. Presumably such a duty does not exist, but clarification of that would have been useful to definitively resolve the issue.

PROTECTIVE CLAIM PROCEDURES

For expenses and claims that cannot be deducted under the actual payment requirement or any of its exceptions, the 2009 Regulations take a "wait and see" approach. If paid after the estate tax return is filed, or facts develop to allow deduction under one of the three exceptions to the actual payment requirement, the estate can file a supplemental estate tax return and claim for refund within the statute of limitations refund period to claim the deduction. [Section 6511\(a\)](#) provides that a claim for refund of any overpayment of taxes must be commenced within three years from the time the return was filed or two years from the time the tax was paid, whichever period expires later. [28](#)

Often the resolution of contests and other uncertainties and contingencies will not occur within the statutory refund period. To allow a later refund, new [Reg. 20.2053-1\(d\)\(5\)](#) permits the filing of a protective refund claim within the refund period. This allows for a refund to be sought after the statutory refund limitations period expires.

This procedure is helpful to estates by allowing for deductions that are resolved beyond the refund limitations date. It is also a trap for practitioners, because of the affirmative need to make the protective claim within the original limitations period if a later adjustment is desired. Estate practitioners should make sure their administration checklists include a review of the need for a protective refund claim to be filed before the refund period expires. [29](#)

The protective refund claim cannot be a blanket protective request. It must hone in on the specific issues that may be subject to a later refund claim. It need not state a particular dollar amount, or demand an immediate refund. But it must identify each outstanding claim or expense for which a future claim may be made, and must describe the reasons and contingencies delaying the actual payment. The claim also should include the costs that will be incurred in resolving the claim so that a deduction for those costs also can be obtained.

The IRS will not take any action on the claim until the executor notifies the Service within a reasonable period after the contingency has been resolved and the amount deductible has been established under the deduction rules. If the expense or claim would be payable out of assets that

otherwise would qualify for the charitable or marital deduction, the estate need not reduce those deductions until the deduction is paid or resolved. ³⁰

Practitioners may be wary of filing protective refund claims, due to concerns that other items on the return may then be open to examination by the IRS. This is a legitimate concern since the Service has the authority to examine each item on a return to determine the correct tax liability, regardless of whether the period of limitations on assessment has expired. ³¹ Even if the Service is barred from assessing any additional amount of tax by reason of the expiration of the period of limitations on assessment under [Section 6501](#), the IRS may reject the claim for refund to the extent it determines there is no overpayment of tax. Nevertheless, in [Notice 2009-84, 2009-44 IRB 592](#), the IRS took action to alleviate these concerns when it provided that reviews of protective refund claims for [Section 2053](#) items will limit themselves to the subject refund claim items (in the absence of evidence of fraud, malfeasance, collusion, concealment, or misrepresentation of a material fact) if the protective claim ripens after the expiration of the period of limitations. ³²

GUIDANCE AS TO PARTICULAR TYPES OF CLAIMS

The 2009 Regulations provide specific guidance as to applying the rules to certain types of claims.

Potential and unmatured claims. By definition, potential and unmatured claims are "unpaid" and cannot be deducted per the actual payment requirement. If such claims meet the requirements for deductibility under any of the three exceptions to the actual payment requirement, however, they can be deducted. ³³ Deductibility can be obtained after the estate tax return is filed through subsequent payment or changes in circumstances, via a supplemental return and claim for refund.

Contested claims. Claims that are

[pg. 143]

being contested cannot be deducted under the actual payment requirement. ³⁴ Such contested claims also cannot be deducted under the reasonably ascertainable amount exception, but the other two exceptions from the actual payment rule can be used if they apply. ³⁵

Deductibility can be obtained after the estate tax return is filed through subsequent payment or changes in circumstances, via a supplemental return and claim for refund. The estate may deduct expenses paid in defending the estate against the claim. ³⁶

Claim against both estate and others. If the estate is one of two or more parties against whom the claim is being asserted, the estate may deduct only the portion of the total claim due from and paid by the estate, reduced by the total of any reimbursement received from another party, insurance, or otherwise. ³⁷ The reduction extends to amounts the estate could have collected from another party or an insurer but which the estate declined or failed to attempt to collect. ³⁸

Unenforceable claims. Claims that are unenforceable prior to or at the decedent's death are not deductible, even if they are actually paid. ³⁹ Claims that become unenforceable during the administration of the estate are not deductible to the extent that they are paid (or will be paid) after they become unenforceable. ⁴⁰

Claims founded on a promise. Deductions for claims founded on a promise or agreement require that the promise or agreement be bona fide and in exchange for adequate and full consideration. ⁴¹ See the discussion below for more on the "bona fide" requirement.

OTHER ISSUES COVERED BY THE REGULATIONS

Beyond issues of contingent and uncertain expense and claim deductions, the 2009 Regulations also provide guidance and limits on other [Section 2053](#) deduction issues.

Bona fide requirement and family member claims. To be deductible under [Section 2053](#), claims or expenses must be "bona fide." They cannot be a disguised gift or bequest. ⁴²

Clearly, Treasury is concerned that taxpayers will try to convert taxable gifts or bequests into deductible payments of claims or expenses. This concern is heightened in the family scenario, and the Regulations provide that deductible payments to family members (including their related entities and beneficiaries) can expect scrutiny.⁴³ Treasury should be commended for removing the actual presumption against deductibility for such payments that was included in the Proposed Regulations.⁴⁴

In reviewing payments to family members, new [Reg. 20.2053-1\(b\)\(2\)\(ii\)](#) provides a list of nonexhaustive factors to establish the "bona fides" for deductibility. These are:

- (1) The transaction underlying the claim or expense occurs in the ordinary course of business, is negotiated at arm's length, and is free from donative intent.
- (2) The nature of the claim or expense is not related to an expectation or claim of inheritance.
- (3) The claim or expense originates pursuant to an agreement between the decedent and the family member, related entity, or beneficiary, and the agreement is substantiated with contemporaneous evidence.
- (4) Performance by the claimant is pursuant to the terms of an agreement between the decedent and the family member, related entity, or beneficiary, and the performance and the agreement can be substantiated.
- (5) All amounts paid in satisfaction or settlement of a claim or expense are reported by each party for federal income and employment tax purposes, to the extent appropriate, in a manner that is consistent with the reported nature of the claim or expense.

[Reg. 20.2053-1\(b\)\(iii\)](#) provides definitions for "family members," "related entities," and beneficiaries.⁴⁵

Reimbursements. No deduction is allowed for claims or expenses that are or could be compensated for by insurance or otherwise reimbursed.⁴⁶ Partial deductions are allowed where there are only partial reimbursements.

A potential reimbursement will not reduce the deductible amount if the executor provides a reasonable explanation on the estate tax return

[pg. 144]

for his or her reasonable determination that the burden of necessary collection efforts in pursuit of a right of reimbursement would outweigh the anticipated benefit from those efforts.⁴⁷ Nevertheless, subsequent events (including an actual reimbursement) will be considered if occurring within the refund claims period (including protective refund claim periods).

Decrees and settlements. Contested or uncertain estate expenses and obligations are often resolved by court decree, consent decree, or settlement. The IRS is concerned that deduction amounts may be set by collusive or uncontested resolutions that do not give a fair hearing to the amount at issue, and thus may overstate claims and expenses. New [Reg. 20.2053-1\(b\)\(3\)](#) seeks to provide some certainty with rules as to when the IRS will respect such outcomes. To be deductible, such payments also must meet all other [Section 2053](#) requirements.⁴⁸

Court decrees. The IRS will respect a court decree as to the amount of a claim or expense if (1) the court has competent jurisdiction, and (2) the court "actually passes upon the facts on which deductibility depends."⁴⁹ It must appear that the court actually passed on the merits of the claim. This will be presumed if there was an "active and genuine" contest on the issue. The IRS will interpret an unreasonable result as evidence that there was no such contest. Actual payment is not required for deductibility if the claim or expense will be paid.

Items not requiring court approval. For items for which court approval is not required under local law, the Service will not find the lack of court approval as jeopardizing deductibility.⁵⁰ Thus, an estate will not need to seek court approval of expenses and items to obtain a deduction if approval is not otherwise required under local law.

Consent decrees. Where a court order or decree is entered after the motion or petition of a party, and for which all interested parties have filed or indicated their consent, IRS will respect such a

decree if it "resolves a bona fide issue in a genuine contest." Such resolution will be presumed present if consents are given by *all* parties having an adverse interest to that of the claimant. ⁵¹ Again, actual payment is not required if the amount will be paid. The deduction, however, cannot exceed any applicable local law limits on such payment. ⁵²

Settlements. The IRS will respect an amount due determined in settlement if it resolves a bona fide issue in a genuine contest and is the product of arm's-length negotiations by parties having adverse interests with respect to the claim or expense. ⁵³ This rule is similar to that for a consent decree, but adds the requirement for arm's-length negotiations.

As a practical matter, the hiring of separate counsel by the parties and evidence of back and forth negotiations should be helpful in meeting this standard. Also, if there is a lack of significant evidence of arm's-length negotiations, it may be preferable to use a consent decree since it does not have the arm's-length negotiation requirement if a genuine contest nonetheless existed.

No deduction will be allowed for amounts paid in settlement of an unenforceable claim, such as amounts in excess of local law limitations. ⁵⁴

The IRS cannot challenge a settlement on the theory that the estate should have further litigated or contested the matter if the estate can establish that the cost of defending or contesting the claim or expense, or the delay associated with litigation, would impose a higher burden on the estate than the payment of a settlement amount. ⁵⁵ Again, actual payment is not required if the amount will be paid.

The Proposed Regulations had an additional requirement that the settlement be within the range of reasonable outcomes under applicable state law governing the issues resolved by the settlement. ⁵⁶ This requirement did not make it into the 2009 Regulations.

Contest expenses. Expenses incurred in defending the estate against claims are deductible if they meet all other [Section 2053](#) requirements. This applies even if the estate does not ultimately prevail. Such expenses include arbitration and mediation expenses, costs of defending claims even if the claims are unenforceable, and costs associated with negotiated settlements. ⁵⁷

Interest on claims. If a claim is deductible, so is the interest on it accrued at the date of death (if actually paid or if it meets the reasonably ascertainable amount exception to the actual payment requirement). ⁵⁸ Post-death interest is deductible, when it otherwise meets Code requirements, either as a [Section 2053](#) administration expense or as an income tax deduction. ⁵⁹

CONCLUSION

The 2009 Regulations present a well-developed set of rules for addressing the deductibility of uncertain, contingent, and contested expenses and claims. Below the surface is the adoption of a policy decision to both allow and require consideration of post-death events, even though this issue has not been definitively resolved in the law. The principal implication of this policy decision is that estates may need to defer deductions and pay estate taxes with initially filed returns when claims are not paid before filing, until post-death issues are resolved and payments are made. This payment of a tax that may ultimately not be due shifts the burden of uncertainty onto estates.

Practice Notes

For claims against an estate that cannot be paid before the due date of the estate tax payment, estates will initially have to pay taxes without benefit of a deduction (except to the extent that the claims come within an exception to the actual payment requirement). This can have a substantial adverse effect on the cash flow requirements of an estate. The ability to get a deduction *later* via a refund claim (with or without a protective refund claim, if needed to keep the statute of limitations open) provides cold comfort for estates that may need to sell assets or otherwise position themselves so as to be able to make an estate tax payment that ultimately may be refunded.

¹

Unless and until modified by Congress, federal estate and generation-skipping taxes do not apply to decedents dying in 2010. See Blattmachr, Gans, Zaritsky, and Zeydel, "The Impossible Has Happened: No Federal Estate Tax, No GST Tax, and Carryover Basis for 2010," [112 JTAX 68 \(February 2010\)](#). Nevertheless, the issues discussed in this article will have relevance for estate tax returns due for decedents dying prior to or after 2010.

2

The estate tax return is due on the day of the ninth calendar month after the decedent's death numerically corresponding to the day of the calendar month on which death occurred, or 15 months if properly extended. See [Regs. 20.6075-1](#) and [20.6081-1\(b\)](#).

3

Former Reg. 20.2053-1(b)(3).

4

Id.

5

The cases most often cited for the proposition that post-death events are not to be considered are Ithaca Trust Co., [7 AFTR 8856](#), 279 US 151, 73 L Ed 647, 1929-1 CB 313 (1929) (relating to determining the amount of the charitable deduction), and Estate of Smith, [84 AFTR 2d 99-7393](#), 198 F3d 515 (CA-5, 1999), *nonacq.* The principal authority allowing consideration of post-death events is Jacobs, [7 AFTR 9308](#), 34 F2d 233, 1929-2 CB 403 (CA-8, 1929), *cert. den.*, and [FSA 200217022](#).

6

[Reg. 20.2053-4\(a\)\(2\)](#).

7

[Reg. 20.2053-1\(d\)\(1\)](#) provides that "... the deduction for any claim or expense ... is limited to the total amount actually paid in settlement or satisfaction of that item." See also [Reg. 20.2053-4\(a\)\(1\)\(i\)](#). This applies to all [Section 2053\(a\)](#) deductions, not just claims, and thus also includes funeral, administrative, or indebtedness claims and expenses. To be deductible, all other requirements for deductibility under the Code and Regulations still must be complied with—payment alone does not allow deductibility.

8

[Reg. 20.2053-1\(d\)\(4\)\(i\)](#).

9

Id.

10

The vague and uncertain exclusions were also found in the prior Regulations.

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[Reg. 20.2053-1\(d\)\(4\)\(ii\)](#). Indeed, the Service is directed to take such items into account in conducting examinations.

12

Id.

13

[Reg. 20.2053-4\(d\)\(6\)\(i\)](#). But payments made in connection with a mortgage or indebtedness described in and governed by [Reg. 20.2053-7](#) (relating to mortgages and indebtedness on property

that is included in the gross estate) are instead covered by that Regulation.

[14](#)

[Prop. Reg. 20.2053-4\(b\)\(7\)\(i\).](#)

[15](#)

[Reg. 20.2053-4\(d\)\(6\)\(ii\).](#)

[16](#)

[Reg. 20.2053-4\(d\)\(6\)\(i\).](#)

[17](#)

[Reg. 20.2053-4\(d\)\(6\)\(iii\).](#)

[18](#)

Id.

[19](#)

[Reg. 20.2053-4\(b\)\(1\).](#)

[20](#)

Id.

[21](#)

As those terms are defined under [Section 170](#) and its Regulations. Under those Regulations, a qualified appraiser needs an appraisal designation from a recognized organization or otherwise has to meet minimum education and experience requirements. See [Section 170\(f\)\(11\)\(E\)\(ii\)](#). While those rules work well for appraising *property* for charitable deduction purposes, it is questionable whether such appraisers have the requisite experience in valuing claims (and related litigation) in an estate administration.

[22](#)

[Reg. 20.2053-4\(b\)\(3\).](#)

[23](#)

Id. The estate, however, can make a protective refund claim to expand the deduction on its later payment or qualification for the reasonably ascertainable amount exception.

[24](#)

As those terms are applied under [Section 170](#) and its Regulations. See the discussion at note 21, *supra*.

[25](#)

[Regs. 20.2053-4\(c\)\(1\)\(vi\) and -4\(c\)\(3\), Example 3.](#)

[26](#)

[Reg. 20.2053-4\(c\)\(3\)](#), Examples 1 and 2.

[27](#)

[Reg. 20.2053-4\(c\)\(2\).](#)

[28](#)

If an estate pays estate taxes more than three years after the return has been filed (e.g., pursuant

to an audit or tax controversy), it has an additional two years to seek a refund of those taxes. See Wells Fargo Bank, [21 AFTR 2d 1693](#), 393 F2d 272 (CA-9, 1968).

[29](#)

The protective refund claim could be filed at the same time as the Form 706 filing, to avoid the risk of the claim's not being timely filed later in the estate administration. The Preamble to [TD 9468](#) indicates that the Form 706 may be modified in the future to allow for the protective refund claim to be made on the Form 706 itself.

[30](#)

[Reg. 20.2053-1\(d\)\(5\)\(ii\)](#).

[31](#)

Lewis v. Reynolds, [10 AFTR 773](#), 284 US 281, 76 L Ed 293, 1932-1 CB 130 (1932).

[32](#)

This Notice was issued several days prior to the issuance of the revised [Section 2053](#) Regulations in [TD 9468](#). Query whether this provides a perverse incentive to delay resolution of claims subject to a protective refund claim until after the expiration of the limitations period on assessment.

[33](#)

[Reg. 20.2053-4\(d\)\(1\)](#).

[34](#)

[Reg. 20.2053-4\(d\)\(2\)](#). Nevertheless, it is unclear if the actual payment requirement is satisfied if the amount is paid but recovery of the payment is then sought through a contest.

[35](#)

Id.

[36](#)

[Reg. 20.2053-4\(d\)\(7\), Example 1](#).

[37](#)

[Reg. 20.2053-4\(d\)\(3\)](#).

[38](#)

[Reg. 20.2053-4\(d\)\(7\), Example 4](#). For example, the estate pays 100% of joint and several liability and does not pursue other joint and several defendants for their share.

[39](#)

[Reg. 20.2053-4\(d\)\(4\)](#).

[40](#)

Id., but see [Reg. 20.2053-1\(b\)\(3\)\(iv\)](#) regarding a claim whose enforceability is at issue.

[41](#)

[Reg. 20.2053-4\(d\)\(5\)](#). See, however, [Reg. 20.2053-5](#) for pledges and subscriptions.

[42](#)

[Reg. 20.2053-1\(b\)\(2\)\(i\)](#).

[43](#)

[Reg. 20.2053-1\(b\)\(2\)\(ii\)](#).

44

Prop. Reg. 20.2053-4(b)(4).

45

Spouses of a lineal descendant are not considered "family members" for these purposes, but spouses of a grandparent, parent, or sibling are family members.

46

[Reg. 20.2053-1\(d\)\(3\)](#).

47

Id.

48

[Reg. 20.2053-1\(b\)\(3\)\(iv\)](#).

49

[Reg. 20.2053-1\(b\)\(3\)\(i\)](#).

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[Reg. 20.2053-1\(b\)\(3\)\(ii\)](#).

51

[Reg. 20.2053-1\(b\)\(3\)\(iii\)](#).

52

[Reg. 20.2053-1\(b\)\(4\), Example 1](#).

53

[Reg. 20.2053-1\(b\)\(3\)\(iv\)](#).

54

Id.

55

Id.

56

Prop. Reg. 20.2053-1(b)(3).

57

[Reg. 20.2053-3\(d\)\(3\)](#).

58

[Reg. 20.2053-4\(e\)\(1\)](#).

59

[Reg. 20.2053-4\(e\)\(2\)](#).