

Part III – Administrative, Procedural, and Miscellaneous

Guidance on Electing Portability of Deceased Spousal Unused Exclusion Amount

Notice 2011-82

PURPOSE

This notice alerts executors of the estates of decedents dying after December 31, 2010, of the need to file a Form 706, United States Estate (and Generation-Skipping Transfer) Tax Return, within the time prescribed by law (including extensions) in order to elect to allow the decedent's surviving spouse to take advantage of the deceased spouse's unused exclusion amount, if any, pursuant to section 303(a) of the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, P.L. 111-312 (124 Stat. 3302) (TRUIRJCA) and section 2010(c)(5)(A) of the Internal Revenue Code (Code). In particular, for the executor of the estate of a decedent to elect under section 2010(c)(5)(A) (a "portability election") to allow the decedent's surviving spouse to use the decedent's unused exclusion amount, the executor is required to file a Form 706 for the decedent's estate, even if the executor is not otherwise obligated to file a Form 706. This notice also alerts executors of the estates of decedents dying after December 31, 2010, that the estate of such a decedent will be considered to have made a portability election if a Form 706 is timely filed in accordance with the

instructions for that form. For those estates filing a Form 706 that choose not to make a portability election, this notice addresses how to avoid making the election. This notice also reminds taxpayers that a portability election can be made only on a Form 706 timely filed by the estate of a decedent dying after December 31, 2010, and any attempt to make a portability election on a Form 706 filed for the estate of a decedent dying on or before December 31, 2010, will be ineffective. Finally, this notice alerts taxpayers that the Treasury Department and the Internal Revenue Service (Service) intend to issue regulations under section 2010(c) of the Code to address issues arising with respect to the portability election, and anticipate that those regulations will be consistent with the provisions of this notice.

BACKGROUND

Sections 302(a)(1) and 303(a) of TRUIRJCA, enacted on December 17, 2010, amended section 2010(c) of the Code. Section 2010(c), as amended, generally allows the surviving spouse of a decedent dying after December 31, 2010, to use the decedent's unused exclusion amount in addition to the surviving spouse's own basic exclusion amount. Thus, sections 302(a)(1) and 303(a) of TRUIRJCA eliminate the need for spouses to retitle property and create trusts solely to take full advantage of each spouse's basic exclusion amount.

Section 2010(c)(1) of the Code provides that the applicable credit amount is the amount of the tentative tax that would be determined under section 2001(c) if the amount with respect to which the tentative tax is to be computed were equal to the applicable exclusion amount. Thus, generally, the applicable credit amount effectively

exempts from federal estate and gift tax a person's taxable transfers with a cumulative value not exceeding the applicable exclusion amount.

Under section 2010(c)(2), a person's applicable exclusion amount is the sum of (A) the basic exclusion amount and (B) in the case of a surviving spouse, the deceased spousal unused exclusion amount, if any.

Section 2010(c)(3) sets the basic exclusion amount at \$5,000,000 in 2011, to be adjusted annually for inflation after 2011.

Section 2010(c)(4) defines the term "deceased spousal unused exclusion amount" to mean, with respect to the surviving spouse of a decedent dying after December 31, 2010, the lesser of (A) the basic exclusion amount, or (B) the excess of (i) the basic exclusion amount of the last such deceased spouse of such surviving spouse, over (ii) the amount with respect to which the tentative tax is determined under section 2001(b)(1) on the estate of such deceased spouse. The unused exclusion amount of a deceased spouse who died before January 1, 2011, cannot be used by the surviving spouse, regardless of the date of the surviving spouse's death.

Under section 2010(c)(5)(A), a deceased spousal unused exclusion amount may be taken into account by a surviving spouse in determining the surviving spouse's applicable exclusion amount only if the executor of the deceased spouse timely files a Form 706 for the deceased spouse's estate, on which the executor computes the deceased spousal unused exclusion amount and makes a portability election. An election, once made, is irrevocable. However, no election may be made if the Form 706 is filed after the time prescribed by law (including extensions) for filing a Form 706.

Section 6075(a) requires the executor of a decedent's estate filing a tax return to file the Form 706 within 9 months after the date of the decedent's death.

Section 6081(a) provides that the Secretary may grant a reasonable extension of time for filing any return; however, generally, no such extension may be for more than 6 months. Section 20.6081-1(b) of the Estate Tax Regulations grants executors of decedents' estates an automatic 6-month extension of time to file the Form 706.

Executors currently may request the automatic extension of time to file Form 706 by timely filing Form 4768, "Application for Extension of Time To File a Return and/or Pay U.S. Estate (and Generation-Skipping Transfer) Taxes."

Section 2010(c)(5)(B) allows the Secretary to examine a return of the predeceased spouse, even after the time has expired under section 6501 for assessing tax under chapter 11 or 12, to make determinations with respect to the deceased spousal unused exclusion amount, notwithstanding any period of limitation in section 6501.

Section 2010(c)(6) provides that the Secretary shall prescribe regulations as may be necessary or appropriate to implement section 2010(c).

DISCUSSION

The Treasury Department and the Service anticipate that, as a general rule, married couples will want to ensure that the unused basic exclusion amount of the first spouse to die will be available to the surviving spouse and, thus, that the estates of most (if not all) married decedents dying after December 31, 2010, will want to make the portability election. As indicated above, because the election is to be made on a timely-filed Form 706, the Treasury Department and the Service anticipate a significant

increase in the number of Forms 706 that will be filed by the estates of decedents dying after December 31, 2010, and that many of those returns will be filed by the estates of decedents whose gross estates have a value below the applicable exclusion amount.

As a result, the Treasury Department and the Service believe that the procedure for making the portability election on the Form 706 should be as straightforward and uncomplicated as possible to reduce the risk of inadvertently missed elections. To that end, the Treasury Department and the Service have determined that the timely filing of a Form 706, prepared in accordance with the instructions for that form, will constitute the making of a portability election by the estate of a decedent dying after December 31, 2010. Thus, by timely filing a properly-prepared and complete Form 706, an estate will be considered to have made the portability election without the need to make an affirmative statement, check a box, or otherwise affirmatively elect, on the Form 706. Until such time as the IRS revises the Form 706 to expressly contain the computation of the deceased spousal unused exclusion amount, a timely-filed and complete Form 706 that is prepared in accordance with the instructions for that form will be deemed to contain the computation of the deceased spousal unused exclusion amount, thereby satisfying the requirements in section 2010(c)(5)(A) for making an effective election.

The Treasury Department and the Service acknowledge that an estate may not want to make the portability election. Not filing a timely Form 706 will prevent the making of that election. However, if such an estate is obligated to file a Form 706 because the value of the gross estate exceeds the applicable exclusion amount, or files a Form 706 for another reason, the executor must follow the instructions for Form 706 that will describe the necessary steps to avoid making the election.

The Treasury Department and the Service recognize that the due date for filing Form 706 for those decedents dying in the first quarter of 2011 is fast approaching and remind executors of the ability to request an automatic 6-month extension by filing Form 4768 before the due date for filing Form 706. See § 20.6081-1(a) and (b) of the Estate Tax Regulations.

The Treasury Department and the Service intend to issue regulations, pursuant to the specific authority provided in section 2010(c)(6), to address various issues arising with respect to implementation of the provisions of section 2010(c).

GUIDANCE

1. If the executor of the estate of a decedent dying after December 31, 2010, intends to make the portability election to allow the decedent's surviving spouse to use the deceased spousal unused exclusion amount, the executor must file a complete Form 706 within the time prescribed by law (including extensions), regardless of whether or not the gross estate has a value in excess of the exclusion amount or otherwise is obligated to file a Form 706.

2. The estate of a decedent dying after December 31, 2010, will be deemed to make the portability election to allow the decedent's surviving spouse to use the deceased spousal unused exclusion amount by the timely filing of a complete and properly-prepared Form 706. To ensure the correct exclusion amount and tax rates, executors should use the Form 706 issued for the year of the decedent's death. Until such time as the IRS revises the Form 706 to expressly contain the computation of the deceased spousal unused exclusion amount, a complete and properly-prepared

Form 706 will be deemed to contain the computation of the deceased spousal unused exclusion amount.

3. The executor of the estate of a decedent dying after December 31, 2010, that timely files a complete Form 706, but that chooses not to make the portability election to allow the decedent's surviving spouse to use the deceased spousal unused exclusion amount, must follow the instructions for Form 706 that will describe the steps the executor must take to notify the Service that the decedent's estate is not making the portability election. If the executor of such an estate chooses not to make the portability election and is not otherwise obligated to file a Form 706, not timely filing a Form 706 will effectively prevent the making of that election.

4. The estate of a decedent dying on or before December 31, 2010, is not entitled to make a portability election. Any attempt to make a portability election on a Form 706 filed for the estate of such a decedent will be ineffective.

5. The Treasury Department and the Service intend to issue regulations to implement the provisions of section 2010(c).

REQUEST FOR COMMENTS

Comments are invited on the following specific issues, which have been identified for consideration in proposed regulations to be issued under section 2010(c):

1. The determination in various circumstances of the deceased spousal unused exclusion amount and the applicable exclusion amount;
2. The order in which exclusions are deemed to be used;
3. The effect of the last predeceasing spouse limitation described in section 2010(c)(4)(B)(i);

4. The scope of the Service's right to examine a return of the first spouse to die without regard to any period of limitation in section 6501; and

5. Any additional issues that should be considered for inclusion in the proposed regulations.

Comments will be considered if submitted in writing by October 31, 2011. All comments will be available for public inspection and copying. Comments may be submitted in one of three ways:

- (a) By mail to CC:PA:LPD:PR (Notice 2011-82), Room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044.
- (b) Electronically to Notice.Comments@irs.counsel.treas.gov. Please include "Notice 2011-82" in the subject line of any electronic communications.
- (c) By hand-delivery Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (Notice 2010-82), Courier's Desk, Internal Revenue Service, 1111 Constitution Ave., NW, Washington, DC 20224.

EFFECTIVE DATE

This notice is applicable with respect to the estates of decedents dying after December 31, 2010.

DRAFTING INFORMATION

The principal author of this notice is Karlene Lesho of the Office of Associate Chief Counsel (Passthroughs and Special Industries). For further information regarding this notice, contact Karlene Lesho at (202) 622-3090 (not a toll-free call).