

Part III

Administrative, Procedural, and Miscellaneous

26 CFR 601.201: Rulings and determination letters.
(Also Part I, Section 2010; 20.2010-2T; 301.9100-3)

Rev. Proc. 2014-18

SECTION 1. PURPOSE

This revenue procedure provides a simplified method for certain taxpayers to obtain an extension of time under § 301.9100-3 of the Procedure and Administration Regulations to make a “portability” election under § 2010(c)(5)(A) of the Internal Revenue Code (Code), by which a decedent’s unused exclusion amount (deceased spousal unused exclusion amount, or DSUE amount) becomes available to apply to the surviving spouse’s subsequent transfers during life or at death. No user fee is required for submissions filed under this revenue procedure.

SECTION 2. BACKGROUND

.01 Rules for Portability

(1) Sections 302(a)(1) and 303(a) of the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 (TRUIRJCA), Pub. L. No. 111-312,

124 Stat. 3296, 3302 (2010), amended § 2010(c) of the Code to allow the estate of a decedent who is survived by a spouse to make a portability election, which allows the surviving spouse to apply the decedent's DSUE amount to the surviving spouse's own transfers during life and at death. The portability election applies to estates of decedents dying after December 31, 2010, if such decedent was survived by a spouse. The portability provisions under § 2010(c) of the Code were scheduled to expire on January 1, 2013, pursuant to § 304 of TRUIRJCA. However, § 101(a) of the American Taxpayer Relief Act of 2012, Pub. L. No. 112-rev. 0, 126 Stat. 2313 (ATRA), made portability permanent.

(2) Section 2010(c)(2) defines the applicable exclusion amount used to determine the applicable credit amount as the sum of the basic exclusion amount and, in the case of a surviving spouse, the DSUE amount. Section 2010(c)(3) defines the basic exclusion amount as \$5,000,000, as adjusted for inflation in each year after calendar year 2011. Section 2010(c)(4), as amended pursuant to a technical correction in § 101(c) of ATRA, defines the DSUE amount as the lesser of (A) the basic exclusion amount, or (B) the excess of the applicable exclusion amount of the last deceased spouse of the surviving spouse over the amount with respect to which the tentative tax is determined under § 2001(b)(1) on the estate of such deceased spouse.

(3) Section 2010(c)(5)(A) provides certain requirements that the executor of the estate of a deceased spouse must satisfy to allow the decedent's surviving spouse to apply the decedent's DSUE amount to the surviving spouse's transfers. In particular, the executor of the estate of the deceased spouse must elect portability of the DSUE amount on a Form 706, United States Estate (and Generation-Skipping Transfer) Tax

Return, which must include a computation of the DSUE amount. Under § 2010(c)(5)(A), a portability election is effective only if made on a Form 706 that is filed within the time prescribed by law (including extensions) for filing such return.

(4) In June 2012, the Department of Treasury (Treasury) and the Internal Revenue Service (the Service) issued temporary regulations (T.D. 9593, 2012-28 I.R.B. 17) under §§ 2010 and 2505, which were published in the Federal Register on June 18, 2012 (77 FR 36150). The portability provisions of the temporary regulations have retroactive effect, applying to estates of decedents dying on or after January 1, 2011.

(5) Section 20.2010-2T(a)(1) of the Estate Tax Regulations provides that an estate that elects portability will be considered, for purposes of subtitle B and subtitle F of the Code, to be required to file a return under § 6018(a). Accordingly, the due date of an estate tax return required to elect portability is 9 months after the decedent's date of death or the last day of the period covered by an extension (if an extension of time for filing has been obtained).

(6) Section 20.2010-2T(a)(2) provides that, upon the timely filing of a complete and properly-prepared estate tax return, an executor of an estate of a decedent survived by a spouse will have elected portability of the decedent's DSUE amount unless the executor chooses not to elect portability and satisfies the requirements in § 20.2010-2T(a)(3)(i) for the election not to apply.

.02 Effect of Decision in United States v. Windsor and Rev. Rul. 2013-17

(1) The recent decision of the Supreme Court in United States v. Windsor, 570 U.S. ____, 133 S. Ct. 2675 (2013), struck down § 3 of the Defense of Marriage Act (DOMA). Section 3 of DOMA provided that:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.

1 U.S.C. § 7. In Windsor, the Supreme Court held that § 3 of DOMA is unconstitutional because it violates Fifth Amendment principles.

(2) Prior to the Windsor decision, the Service interpreted § 3 of DOMA as prohibiting the Service from recognizing same-sex marriages for purposes of determining the marital status of taxpayers under the Code. Accordingly, prior to the Windsor decision, the surviving spouse was not treated as the decedent’s surviving spouse for portability purposes under § 2010(c) if the surviving spouse was of the same sex as the decedent.

(3) Subsequently, the Service issued Rev. Rul. 2013-17, 2013-38 I.R.B. 201, to provide guidance on the effect of the Windsor decision on the Service’s interpretation of the sections of the Code that refer to taxpayers’ marital status. Rev. Rul. 2013-17 holds as follows:

1. For Federal tax purposes, the terms “spouse,” “husband and wife,” “husband,” and “wife” include an individual married to a person of the same sex if the individuals are lawfully married under state law, and the term “marriage” includes such a marriage between individuals of the same sex.

2. For Federal tax purposes, the Service adopts a general rule recognizing a marriage of same-sex individuals that was validly entered into in a state whose laws authorize the marriage of two individuals of the

same sex even if the married couple is domiciled in a state that does not recognize the validity of same-sex marriages.

3. For Federal tax purposes, the terms “spouse,” “husband and wife,” “husband,” and “wife” do not include individuals (whether of the opposite sex or the same sex) who have entered into a registered domestic partnership, civil union, or other similar formal relationship recognized under state law that is not denominated as a marriage under the laws of that state, and the term “marriage” does not include such formal relationships.

(4) Rev. Rul. 2013-17 provides that its holdings will be applied prospectively as of September 16, 2013, the date of its publication in the Internal Revenue Bulletin. In addition, except as otherwise provided in Rev. Rul. 2013-17, affected taxpayers may rely on Rev. Rul. 2013-17 for the purpose of filing original returns, amended returns, adjusted returns, or claims for credit or refund for any overpayment of tax resulting from these holdings, provided the applicable limitations period for filing such claim under § 6511 has not expired. Rev. Rul. 2013-17 further provides that, if an affected taxpayer files an original return, amended return, adjusted return, or claim for credit or refund in reliance on Rev. Rul. 2013-17, all items required to be reported on the return or claim that are affected by the marital status of the taxpayer must be adjusted to be consistent with the marital status reported on the return or claim.

.03 Extensions Granted to Elect Portability under § 301.9100-3

(1) Section 301.9100-3 provides the standards that apply to determine whether to grant an extension of time to make an election whose due date is prescribed by a regulation or other regulatory guidance (and not by statute). The due date for electing portability for those estates required to file an estate tax return under § 6018(a) is prescribed by statute. See §§ 2010(c)(5)(A), 6075(a), and 6018(a). However, if an executor is not required by § 6018(a) to file an estate tax return and the executor files or

may file an estate tax return to elect portability, the due date for electing portability is prescribed by § 20.2010-2T(a), and not by statute. Therefore, in such a case, the executor may seek an extension of time under § 301.9100-3 to elect portability under § 2010(c)(5)(A).

(2) In general, under § 301.9100-3, relief will be granted if the taxpayer establishes to the satisfaction of the Commissioner that the taxpayer acted reasonably and in good faith and that the grant of relief will not prejudice the interests of the government.

(3) To date, the Service has issued several letter rulings under § 301.9100-3 granting an extension of time to elect portability under § 2010(c)(5)(A) in situations in which the decedent's estate was not required to file an estate tax return under § 6018(a) (as determined based on the value of the gross estate and adjusted taxable gifts, without regard to § 20.2010-2T(a)(1)). The Service believes that, in such circumstances, it is appropriate to provide a simplified method to obtain an extension of time to elect portability under § 2010(c)(5)(A), provided that certain requirements (set forth in sections 3 and 4 of this revenue procedure) are met. In such a case, the decedent's DSUE amount then will be available to apply to the surviving spouse's transfers in accordance with the rules prescribed under § 20.2010-3T and § 25.2505-2T.

SECTION 3. SCOPE

.01 In General. This revenue procedure applies only if:

(1) The taxpayer is the executor (see § 20.2010-2T(6)) of the estate of a decedent who:

- (a) has a surviving spouse;
- (b) died after December 31, 2010, and on or before December 31, 2013; and
- (c) was a citizen or resident of the United States on the date of death.

(2) The taxpayer is not required to file an estate tax return under § 6018(a) (as determined based on the value of the gross estate and adjusted taxable gifts, without regard to § 20.2010-2T(a)(1));

(3) The taxpayer did not file an estate tax return within the time prescribed by § 20.2010-2T(a)(1) for filing an estate tax return required to elect portability; and

(4) All requirements of section 4 of this revenue procedure are satisfied.

.02 Taxpayers That Timely-Filed an Estate Tax Return. This revenue procedure does not apply to taxpayers that filed an estate tax return within the time prescribed by § 20.2010-2T(a)(1) for the purpose of electing portability. Such a taxpayer either will have elected portability of the DSUE amount by timely filing that estate tax return or will have affirmatively opted out of portability in accordance with § 20.2010-2T(a)(3)(i).

.03 Failure to Qualify for Relief Under This Revenue Procedure. Taxpayers that are not eligible for relief under this revenue procedure because they do not meet the requirements of section 4 of this revenue procedure or are outside the scope of this revenue procedure because the decedent died after December 31, 2013, may request an extension of time to make the portability election under § 2010(c)(5)(A) by requesting a letter ruling under the provisions of § 301.9100-3. The procedural requirements for requesting a letter ruling are described in Rev. Proc. 2014-1, 2014-1 I.R.B. 1 (or its successors).

SECTION 4. RELIEF FOR CERTAIN LATE PORTABILITY ELECTIONS

.01 Procedural Requirements for Relief. The requirements for relief under this revenue procedure are as follows:

(1) A person permitted to make the election on behalf of a decedent, pursuant to § 20.2010-2T(a)(6), must file a complete and properly-prepared Form 706 on or before December 31, 2014. The Form 706 will be considered complete and properly prepared if it is prepared in accordance with § 20.2010-2T(a)(7).

(2) The person filing the Form 706 on behalf of the decedent's estate must state at the top of the Form 706 that the return is "FILED PURSUANT TO REV. PROC. 2014-18 TO ELECT PORTABILITY UNDER § 2010(c)(5)(A)."

.02 Extent of Relief. If it is determined that the requirements for granting relief, as provided in sections 3.01 and 4.01 of this revenue procedure, have been satisfied, the taxpayer will be deemed to meet the requirements for relief under § 301.9100-3 and relief is granted under the provisions of § 301.9100-3 to extend the time to elect portability under § 2010(c)(5)(A). Accordingly, for purposes of electing portability, the taxpayer's Form 706 will be considered to have been timely filed in accordance with § 20.2010-2T(a)(1). The taxpayer will receive an estate tax closing letter acknowledging receipt of the taxpayer's Form 706.

.03 Subsequent Determination that Taxpayer Is Required to File a Return under § 6018(a). If, subsequent to the grant of relief pursuant to this revenue procedure, it is determined that, based on the value of the gross estate and taking into account any taxable gifts, the taxpayer was required to file an estate tax return pursuant to

§ 6018(a), the grant of an extension referred to in section 4.02 of this revenue procedure is deemed null and void upon such a determination.

SECTION 5. LIMITATIONS PERIOD FOR CLAIM FOR CREDIT OR REFUND BY SURVIVING SPOUSE

.01 Generally, under § 6511(a), a taxpayer's claim for credit or refund of an overpayment of tax must be filed within three years from the date of filing the tax return, or within two years from the date of payment of the tax, whichever period expires later. Accordingly, to obtain a credit or refund of an overpayment of tax by reason of a portability election made pursuant to a grant of relief under this revenue procedure, the surviving spouse (or the executor of the estate of the surviving spouse) of the decedent must file a claim for credit or refund of tax before the expiration of the limitations period in § 6511(a).

.02 Example

(1) Facts

(a) Predeceasing Spouse (S1) dies on January 1, 2011, survived by Surviving Spouse (S2). The assets includible in S1's gross estate consist of cash on deposit in bank accounts held jointly with S2 with rights of survivorship in the amount of \$2,000,000. S1 made no taxable gifts during life. S1's executor is not required to file an estate tax return under § 6018(a), and does not file such a return.

(b) S2 dies on January 14, 2011. S2's taxable estate is \$8,000,000 and S2 made no taxable gifts during life. S2's executor files a Form 706 on behalf of S2's estate on October 14, 2011, and includes payment of the estate tax on the \$3,000,000 in excess of S2's applicable exclusion amount.

(c) Pursuant to this revenue procedure, S1's executor files a Form 706 on behalf of S1's estate on November 1, 2014, reporting a DSUE amount of \$5,000,000. In 2015, the Service (i) determines that S1's estate has met the requirements for a grant of relief under this revenue procedure and is deemed to have made a valid portability election, (ii) accepts S1's return with no changes, and (iii) issues an estate tax closing letter to S1's estate.

(2) Application of limitations period for credit or refund. To recover the estate tax paid, S2's executor must file a claim for credit or refund of tax by October 14, 2014, even though a Form 706 to elect portability has not been filed on behalf of S1's estate at that time. Such a claim filed in anticipation of the filing of the Form 706 by S1's executor will be considered a protective claim for credit or refund of tax. Accordingly, as long as the claim of S2's estate for credit or refund of tax was filed by October 14, 2014, the Service can consider and process that claim for credit or refund of tax once S1's estate is considered to have elected portability pursuant to this revenue procedure.

SECTION 6. EFFECT ON OTHER DOCUMENTS

Rev. Proc. 2014-3, 2014-1 I.R.B. 111, is amplified.

SECTION 7. EFFECTIVE DATE

.01 In general. This revenue procedure is effective January 27, 2014.

.02 Letter rulings will not be issued. Until January 1, 2015, for estates meeting the requirements of section 3.01(1)-(3) of this revenue procedure, the procedure described in section 4 must be used to obtain an extension of time under § 301.9100-3 to make a portability election under § 2010(c)(5)(A) in lieu of requesting a letter ruling under the provisions of § 301.9100-3. However, for requests for rulings pending on

January 27, 2014, see section 7.03 of this revenue procedure.

.03 Transition rule for pending letter ruling requests. If an executor has filed a request for a letter ruling seeking an extension of time under § 301.9100-3 to make a portability election under § 2010(c)(5)(A), that letter ruling is pending in the national office on January 27, 2014, and the decedent's estate is within the scope of this revenue procedure as described in section 3, the executor may rely on this revenue procedure, withdraw the letter ruling request and receive a refund of its user fee. However, the national office will process letter ruling requests pending on January 27, 2014, unless, prior to the earlier of March 10, 2014, or the issuance of the letter ruling, the executor notifies the national office that it will rely on this revenue procedure and withdraw its letter ruling request.

SECTION 8. DRAFTING INFORMATION

The principal author of this revenue procedure is Karlene Lesho of the Office of Associate Chief Counsel (Passthroughs & Special Industries). For further information regarding this revenue procedure contact Karlene Lesho on (202) 317-6859 (not a toll-free call).