

26 CFR 601.201: Rulings and determination letters.

(Also Part I, Sections 2010, 2044, 2056, 2519, 2652; 20.2010-2; 20.2044-1, 20.2056(b)-7, 25.2519-1, 26.2652-1.)

Rev. Proc. 2016-49

SECTION 1. PURPOSE

The 2010 amendment of § 2010(c) of the Internal Revenue Code (Code) allowing an executor of an estate to make an election under § 2010(c)(5)(A) (a portability election) may influence the decision of whether to make a qualified terminable interest property (QTIP) election under § 2056(b)(7) (a QTIP election). A QTIP election would reduce the decedent's taxable estate and thereby maximize the amount of unused exclusion available to be used by the decedent's surviving spouse. Thus, the executor of an estate electing portability of the decedent's unused applicable exclusion amount (deceased spousal unused exclusion amount, or DSUE amount) may wish to make a QTIP election without regard to whether the QTIP election is necessary to reduce the estate tax liability to zero.

Rev. Proc. 2001-38, 2001-24 I.R.B. 1335, provides a procedure by which the IRS will disregard and treat as a nullity for federal estate, gift, and generation-skipping transfer tax purposes a QTIP election made in cases where the election was not necessary to reduce the estate tax liability to zero. Rev. Proc. 2001-38, when issued, provided relief to the surviving spouse of a decedent whose estate received no benefit from the unnecessary QTIP election. With the availability of portability elections, however, the procedure to void and nullify QTIP elections in Rev. Proc. 2001-38 may

bring into question the ability of a decedent's estate to make an otherwise unnecessary QTIP election to maximize the available unused exclusion amount.

This revenue procedure modifies and supersedes Rev. Proc. 2001-38. Although this revenue procedure confirms the procedures by which the IRS will disregard a QTIP election, it excludes from its scope those estates in which the executor made the portability election in accordance with the regulations under § 2010(c)(5)(A).

SECTION 2. BACKGROUND

.01 QTIP Rules and Rev. Proc. 2001-38.

(1) Section 2056(a) provides that, except as limited by § 2056(b), the value of a taxable estate is determined by deducting from the value of the gross estate an amount equal to the value of any interest in property which passes or has passed from the decedent to the surviving spouse. Section 2056(b)(1) denies a marital deduction for an interest passing to the surviving spouse that is a "terminable interest." An interest is a terminable interest if the interest passing to the surviving spouse will terminate or fail on the lapse of time or on the occurrence of an event or contingency or on the failure of an event or contingency to occur, and on termination, an interest in the property passes to someone other than the surviving spouse.

(2) Section 2056(b)(7)(A) provides an exception to this terminable interest rule in the case of QTIP. For purposes of § 2056(a), QTIP is treated as passing to the surviving spouse, and no part of the property is treated as passing to any person other than the surviving spouse. Under § 2056(b)(7)(B)(i), QTIP is property that passes from

the decedent, in which the surviving spouse has a qualifying income interest for life, and to which an election under § 2056(b)(7)(B)(v) applies.

(3) Section 2056(b)(7)(B)(v) provides that the QTIP election is made by the executor on the return of tax imposed by § 2001. This election, once made, is irrevocable.

(4) Section 20.2056(b)-7(b)(4)(i) of the Estate Tax Regulations provides that the QTIP election is made on the return of tax imposed by § 2001 (or § 2101). The term “return of tax imposed by § 2001” means the last estate tax return (Form 706—United States Estate (and Generation-Skipping Transfer) Tax Return) filed by the executor on or before the due date of the return, including extensions, or, if a timely return is not filed, the first estate tax return filed after the due date. Section 20.2056(b)-7(b)(4)(ii) confirms that the election, once made, is irrevocable.

(5) A QTIP election has estate, gift, and generation-skipping transfer tax consequences for the surviving spouse. Section 2044(a) and (b) provides generally that the value of the gross estate includes the value of any property in which the decedent (the deceased surviving spouse) has a qualifying income interest for life and with respect to which a deduction was allowed for the transfer of the property to that decedent under § 2056(b)(7). Similarly, under § 2519(a) and (b), any disposition of all or part of a qualifying income interest for life in any property with respect to which a deduction was allowed under § 2056(b)(7) is treated as a transfer of all interests in the property other than the qualifying income interest. Finally, in the absence of a “reverse

QTIP” election under § 2652(a)(3), the surviving spouse will be treated as the transferor of the property for generation-skipping transfer tax purposes under § 2652(a).

(6) Rev. Proc. 2001-38 provided relief from unnecessary QTIP elections. An example of an unnecessary QTIP election is one that was made when the value of the taxable estate, before allowance of the marital deduction, was less than the applicable exclusion amount under § 2010(c), so that no estate tax would have been imposed whether or not the QTIP election was made. Rev. Proc. 2001-38 also provided a second example where the decedent’s will provided for a “credit shelter trust” to be funded with an amount equal to the applicable exclusion amount under § 2010(c), with the balance of the estate passing to a trust intended to qualify for the marital deduction, and the estate made QTIP elections for both the credit shelter trust and the marital trust. The QTIP election for the credit shelter trust was not necessary because no estate tax would have been imposed on the value of that trust whether or not the QTIP election was made for that trust. In these situations, before the issuance of Rev. Proc. 2001-38, the unnecessary QTIP election caused the property subject to the election to be included in the surviving spouse’s gross estate under § 2044(a), or to be subject to gift tax upon the surviving spouse’s inter vivos disposition of the income interest, and, in the absence of a “reverse QTIP” election under § 2652(a)(3), would cause the surviving spouse to be treated as the transferor of the property for generation-skipping transfer tax purposes. Therefore, when Rev. Proc. 2001-38 was issued (specifically, before the availability of portability), an unnecessary QTIP election produced adverse tax consequences and no benefit for taxpayers. Rev. Proc. 2001-38 provided relief by

treating the unnecessary QTIP election as a nullity for federal estate, gift, and generation-skipping transfer tax purposes.

.02 Section 2010(c) and the Introduction of Portability Elections.

(1) In 2010, Congress amended § 2010(c) of the Code, and made conforming amendments to §§ 2505(a), 2631(c), and 6018(a)(1), to permit the executor of an estate to make a portability election allowing a decedent's unused applicable exclusion amount to benefit a surviving spouse. See §§ 302(a)(1) and 303(a) of the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. No. 111-312, 124 Stat. 3296, 3302 (Dec. 17, 2010). A portability election allows the surviving spouse to apply the DSUE amount of a deceased spouse to the surviving spouse's subsequent transfers during life and at death.

(2) Section 2010(c)(1) describes the applicable credit amount as the amount of the tentative tax that would be determined under § 2001(c) if the amount with respect to which such tentative tax is to be computed were equal to the applicable exclusion amount. 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.

(3) Under § 2010(c)(2), the applicable exclusion amount is the sum of the basic exclusion amount and, in the case of a surviving spouse, the DSUE amount, if any.

(4) Section 2010(c)(3) defines the basic exclusion amount as \$5,000,000, subject to annual adjustments after 2011 for inflation.

(5) Section 2010(c)(4), as amended by § 101(c) of the American Taxpayer Relief Act of 2012, Pub. L. No. 112-240, 126 Stat. 2313, 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. Excluded from the definition of the term “DSUE amount” is any unused exclusion amount from a deceased spouse who died before January 1, 2011.

(6) 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 make a portability election on an estate 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 an estate tax return that is filed within the time prescribed by law (including extensions) for filing such return.

(7) Section 20.2010-2(a)(2) provides that an executor of an estate of a decedent survived by a spouse makes a portability election upon the timely filing of a complete and properly prepared estate tax return, unless the executor satisfies the requirement in § 20.2010-2(a)(3)(i) to not be considered to make the portability election.

(8) Section 20.2010-2(a)(3) provides that the executor of the decedent’s estate will not make or be considered to make the portability election if--(i) the executor makes an affirmative statement to that effect on a timely filed estate tax return, as set forth in

the instructions for such form (“Instructions for Form 706”) or (ii) the executor does not timely file an estate tax return.

(9) Section 20.2010-3(c)(1) and § 25.2505-2(d)(1) of the Gift Tax Regulations provide that a portability election made by the executor of a decedent’s estate applies as of the date of the decedent’s death and, therefore, the DSUE amount of a decedent survived by a spouse generally is included in determining the applicable exclusion amount of the surviving spouse under § 2010(c)(2) with respect to transfers occurring after the death of the decedent. Accordingly, when the executor of a decedent’s estate makes a portability election, the surviving spouse may apply the decedent’s DSUE amount to the surviving spouse’s subsequent transfers during life and at death.

.03 Planning with QTIP Trusts after Enactment of Portability.

(1) Rev. Proc. 2001-38 was premised on the belief that an executor would never purposefully elect QTIP treatment for property if the election was not necessary to reduce the decedent’s estate tax liability.

(2) With the amendment of §§ 2010(c) and 2505(a) to provide for portability elections, an executor of a deceased spouse’s estate may wish to elect QTIP treatment for property even where the election is not necessary to reduce the estate tax liability. A QTIP election would reduce the amount of the taxable estate and the tax imposed by § 2001(a) (if any), resulting in less use of the decedent’s applicable credit amount and producing a greater DSUE amount than would exist if no QTIP election was made for the property. An increased DSUE amount available to the surviving spouse increases the applicable credit amount available to the surviving spouse to wholly or partially

offset the surviving spouse's gift or estate tax liability that is attributable to the QTIP or any other property.

(3) In view of the foregoing, the Treasury Department and the IRS have determined that it is appropriate to continue to provide procedures by which the IRS will disregard an unnecessary QTIP election and treat such election as null and void, but only for estates in which the executor neither made nor was considered to have made the portability election. In estates in which the executor made the portability election, QTIP elections will not be treated as void.

SECTION 3. SCOPE

.01 This revenue procedure treats as void QTIP elections made in cases where all of the following requirements are satisfied:

(1) The estate's federal estate tax liability was zero, regardless of the QTIP election, based on values as finally determined for federal estate tax purposes, thus making the QTIP election unnecessary to reduce the federal estate tax liability;

(2) The executor of the estate neither made nor was considered to have made the portability election as provided in § 2010(c)(5)(A) and the regulations thereunder;
and

(3) The requirements of section 4.02 of this revenue procedure are satisfied.

.02 This revenue procedure does not treat as void QTIP elections made to treat property as QTIP in cases where:

(1) A partial QTIP election was required with respect to a trust to reduce the estate tax liability and the executor made the election with respect to more trust property than was necessary to reduce the estate tax liability to zero;

(2) A QTIP election was stated in terms of a formula designed to reduce the estate tax to zero. See, for example, § 20.2056(b)-7(h), Examples 7 and 8;

(3) The QTIP election was a protective election under § 20.2056(b)-7(c);

(4) The executor of the estate made a portability election in accordance with § 2010(c)(5)(A) and the regulations thereunder, even if the decedent's DSUE amount was zero based on values as finally determined for federal estate tax purposes; or

(5) The requirements of section 4.02 of this revenue procedure are not satisfied.

.03 The procedures described in section 4 of this revenue procedure must be used in lieu of requesting a letter ruling under the provisions of Rev. Proc. 2016-1, 2016-1 I.R.B. 1 (or its successors). Accordingly, user fees do not apply to corrective action under this revenue procedure.

.04 QTIP elections for which relief has been granted under the procedures of Rev. Proc. 2001-38 are not within the scope of this revenue procedure.

SECTION 4. PROCEDURE

.01 Relief for Unnecessary QTIP Election. In the case of a QTIP election within the scope of section 3.01 of this revenue procedure, the IRS will disregard the QTIP election and treat it as null and void for purposes of §§ 2044(a), 2056(b)(7), 2519(a), and 2652. The property for which the QTIP election is disregarded under this revenue

procedure will not be includible in the gross estate of the surviving spouse under § 2044, and the spouse will not be treated as making a gift under § 2519 if the spouse disposes of part or all of the income interest with respect to the property. Finally, the surviving spouse will not be treated as the transferor of the property for generation-skipping transfer tax purposes under § 2652(a).

.02 Procedural Requirements for Relief to Treat QTIP Election As Void.

(1) Taxpayer satisfies the requirements of this section by submitting the information required by this section in connection with (a) a supplemental Form 706 filed for the estate of the predeceased spouse, (b) a Form 709 (United States Gift (and Generation-Skipping Transfer) Tax Return) filed by the surviving spouse, or (c) a Form 706 filed for the estate of the surviving spouse. A supplemental Form 706 filed for the estate of the predeceased spouse may be filed only by a person permitted to do so (see § 20.6018-2) and only if the applicable period of limitations (whether on assessments or claims for credit or refund) has not expired with respect to the return of the predeceased spouse.

(2) Taxpayer must notify the IRS that a QTIP election is within the scope of section 3.01 of this revenue procedure. Notice is provided by entering at the top of the Form 706 or Form 709 the notation “Filed pursuant to Revenue Procedure 2016-49.”

(3) Taxpayer must identify the QTIP election that should be treated as void under this revenue procedure and provide an explanation of why the QTIP election falls within the scope of section 3.01 of this revenue procedure. The explanation should include all the relevant facts, including the value of the predeceased spouse’s taxable

estate without regard to the allowance of the marital deduction for the QTIP at issue compared to the applicable exclusion amount in effect for the year of the predeceased spouse's death. The explanation should state that the portability election was not made in the predeceased spouse's estate and include the relevant facts to support this statement.

(4) Taxpayer must provide sufficient evidence that the QTIP election is within the scope of section 3.01 of this revenue procedure. Evidence sufficient to establish that the QTIP election was not necessary to reduce the estate tax liability to zero based on values as finally determined for federal estate tax purposes and that the executor opted not to elect portability of the DSUE amount may include a copy of the predeceased spouse's estate tax return filed with the IRS. If the executor of the predeceased spouse's estate was not considered to have made a portability election because of a late filing of that return, evidence may consist of the account transcript reflecting the date the estate tax return was filed.

SECTION 5. EFFECT ON OTHER DOCUMENTS

Rev. Proc. 2001-38 is modified and superseded.

SECTION 6. EFFECTIVE DATE

This revenue procedure is effective **September 27, 2016** and applies to QTIP elections within the scope of this revenue procedure.

SECTION 7. DRAFTING INFORMATION

The principal author of this revenue procedure is Juli Ro Kim of the Office of Associate Chief Counsel (Passthroughs & Special Industries). For further information

regarding this revenue procedure contact Ms. Kim on (202) 317-6859 (not a toll-free number).