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Part III

Administrative, Procedural, and Miscellaneous

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

Rev. Proc. 2017-34

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). For purposes of the Federal estate and gift taxes, a portability election allows a decedent’s unused exclusion amount (deceased spousal unused exclusion amount, or DSUE amount) to become available for application to the surviving spouse’s subsequent transfers during life or at death. The simplified method provided in this revenue procedure is to be used in lieu of the letter ruling process. No user fee is required for submissions filed under this revenue procedure.

SECTION 2. BACKGROUND

.01 Rules for Portability

(1) Section 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. For purposes of the Federal estate and gift taxes, a portability election 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 is survived by a spouse. The portability provisions under § 2010(c) of the Code were scheduled to expire on January 1, 2013, pursuant to §§ 101(a)(1) and 304 of TRUIRJCA. However, § 101(a) of the American Taxpayer Relief Act of 2012 (ATRA), Pub. L. No. 112-240, 126 Stat. 2313 (2013), made the ability to elect portability permanent.

(2) Section 2010(c)(2) of the Code 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) of the Code defines the basic exclusion amount as \$5,000,000, as adjusted for inflation in each year after calendar year 2011. Section 2010(c)(4) of the Code, 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) of the Code 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 elect portability and thereby make the decedent's DSUE amount available to the decedent's surviving spouse. In particular, the executor of the estate of the deceased spouse must elect portability of the DSUE amount 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.

(4) On June 18, 2012, the Department of the Treasury (Treasury) and the Internal Revenue Service (the Service) published in the Federal Register (77 FR 36150) temporary regulations under §§ 2010 and 2505 (T.D. 9593, 2012-28 I.R.B. 17). The portability provisions of the temporary regulations have retroactive effect, applying to estates of decedents dying on or after January 1, 2011. On the same day, a notice of proposed rulemaking (REG-141832-11) containing regulations proposed by cross-reference to the temporary regulations was published in the Federal Register (77 FR 36229). Treasury and the Service published final regulations (80 FR 34279) under §§ 2010 and 2505 on June 16, 2015 (T.D. 9725, 2015-26 I.R.B. 1122), which generally adopt the rules in the temporary and proposed regulations and apply to estates of decedents dying on or after June 12, 2015.

(5) Section 20.2010-2(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). Section 20.2010-2(a)(1) further provides that an extension of time to elect portability will not be granted under § 301.9100-3 to an estate that is required to file an estate tax return under § 6018(a), as determined based on the value of the gross estate and adjusted taxable gifts and without regard to the need to file for portability election purposes. Such an extension, however, may be available to an estate that 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 and without regard to the need to file for portability election purposes.

(6) Section 20.2010-2(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 § 20.2010-2(a)(3)(i) for the portability election not to apply.

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

(1) Section 301.9100-3 provides the standards that the Service is to apply to determine whether to grant an extension of time to make an election whose due date is prescribed by a regulation or other administrative guidance (and not by statute). The due date for electing portability for those estates not required by § 6018(a) to file an estate tax return is prescribed by § 20.2010-2(a), and not by statute. Therefore, the executor of such an estate 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) On February 10, 2014, the Service published Rev. Proc. 2014-18, 2014-7 I.R.B. 513, which provided a simplified method for obtaining an extension of time under § 301.9100-3 to make a portability election under § 2010(c)(5)(A) that was available to the estates of decedents dying after December 31, 2010, if such an estate was not required by § 6018(a) to file an estate tax return and if such a decedent was survived by a spouse. However, this simplified method was available only on or before December 31, 2014. The revenue procedure stated that, through that same date, the Service would not issue letter rulings to such estates granting an extension of time under § 301.9100-3 to make a portability election under § 2010(c)(5)(A).

(4) Since December 31, 2014, the Service has issued numerous 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 by § 6018(a) to file an estate tax return. Many of these ruling requests have involved estates of decedents that discovered the failure to elect portability not long after the due date set forth in § 20.2010-2(a)(1) for filing an estate tax return to elect portability. Other ruling requests have involved estates of decedents with a date of death in the first years after the enactment of the portability election provisions, where the executor did not know about the need to file a return to elect portability, or did not discover the failure to elect portability, until many years later, often after the death of the surviving spouse.

(5) Treasury and the Service have determined that the considerable number of ruling requests for an extension of time to elect portability received since December 31, 2014, indicates a need for continuing relief for the estates of decedents having no filing requirement under § 6018(a). Further, the considerable number of ruling requests received has placed a significant burden on the Service. Accordingly, this revenue procedure provides a simplified method to the estates of decedents having no filing requirement under § 6018(a) to obtain an extension of time under § 301.9100-3 to elect portability, provided that certain requirements (set forth in sections 3.01 and 4.01 of this revenue procedure) are met.

(6) In providing this relief, Treasury and the Service have considered requests received for a permanent and unlimited extension, but also have considered both the statutory requirement of a timely filed return and the prejudice to the government from a lack of available records and current appraisals resulting from a long delay between a decedent's death and the filing of an estate tax return for that decedent's estate. Accordingly, this revenue procedure provides a simplified method to obtain an extension of time to elect portability that is available to the estates of decedents having no filing requirement under § 6018(a) for a period the last day of which is the later of January 2, 2018, or the second anniversary of the decedent's date of death. A taxpayer seeking relief to elect portability after the second anniversary of a decedent's death may do so by requesting a letter ruling in accordance with the requirements of § 301.9100-3 and Rev. Proc. 2017-1, 2017-1 I.R.B. 1 (or any successor revenue procedure).

(7) Making the simplified method of this revenue procedure available for all eligible estates through January 2, 2018, provides additional relief to the estates of

decedents with a date of death in the first years after the enactment of the portability election provisions because the executors of those estates and their advisors may not have been aware of the opportunity and need to file an estate tax return to elect portability. Making the simplified method of this revenue procedure available after January 2, 2018, to estates during the two-year period immediately following the decedent's date of death should not unduly compromise the ability of the taxpayer or the Service to compute and verify the DSUE amount because the necessary records are likely to be available during that period. In addition, limiting the availability of this simplified method to that two-year period could be beneficial to the surviving spouse or the surviving spouse's estate in two ways. First, it increases the likelihood that the portability election will be made before the surviving spouse or the executor of the surviving spouse's estate is required to file a gift or estate tax return, thus eliminating the need to file such a return without claiming any DSUE amount and then, after the portability election has been made, having to either file a supplemental return or file a claim for a credit or refund. Second, if the allowance of the portability election made pursuant to this revenue procedure and the corresponding revised computation of the surviving spouse's applicable credit amount would result in a credit or refund of the surviving spouse's gift or estate tax, the availability of the simplified method during the two-year period may reduce the risk that the period under § 6511 for filing a claim for that credit or refund (generally, extending three years from the date of filing or, if later, two years from the date of payment) would expire before the portability election could be made pursuant to this revenue procedure.

SECTION 3. SCOPE

.01 In General. The simplified method of this revenue procedure is available to the executor (either an appointed executor or, if none, a non-appointed executor, as provided in § 20.2010-2(a)(6)) of the estate of a decedent if:

(1) The decedent:

(a) was survived by a spouse;

(b) died after December 31, 2010; and

(c) was a citizen or resident of the United States on the date of death.

(2) The executor 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 and without regard to the need to file for portability purposes;

(3) The executor did not file an estate tax return within the time required by § 20.2010-2(a)(1) for filing an estate tax return; and

(4) The executor satisfies all requirements of section 4.01 of this revenue procedure.

.02 Executors that Timely Filed an Estate Tax Return. The simplified method of this revenue procedure is not available to the estate of a decedent whose executor filed an estate tax return within the time prescribed by § 20.2010-2(a)(1). Such an executor 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 § 20.2010-2(a)(3)(i).

.03 Failure to Qualify for Relief under this Revenue Procedure. The executor of an estate not within the scope described in section 3.01 of this revenue procedure only

because the executor does not satisfy the requirements of section 4.01 of this revenue procedure 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 requirements for requesting a letter ruling are described in Rev. Proc. 2017-1 (or any successor revenue procedure).

SECTION 4. RELIEF FOR CERTAIN LATE PORTABILITY ELECTIONS

.01 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 the estate of a decedent--that is, an executor described in § 20.2010-2(a)(6)--must file a complete and properly prepared Form 706, United States Estate (and Generation-Skipping Transfer) Tax Return, on or before the later of January 2, 2018, or the second annual anniversary of the decedent's date of death. The Form 706 will be considered complete and properly prepared if it is prepared in accordance with § 20.2010-2(a)(7).

(2) The executor 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. 2017-34 TO ELECT PORTABILITY UNDER § 2010(c)(5)(A)."

.02 Extent of Relief. Satisfaction of the requirements for relief, as provided in section 4.01 of this revenue procedure, by an executor for whom the relief is available pursuant to section 3.01 of this revenue procedure, is deemed to satisfy the requirements for relief under § 301.9100-3 and, upon that satisfaction, 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 Form 706 of the

decedent's estate will be considered to have been filed timely in accordance with § 20.2010-2(a)(1).

.03 Subsequent Determination that Executor 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 executor was required to file an estate tax return under § 6018(a), the grant of an extension as provided in section 4.02 of this revenue procedure is deemed null and void *ab initio*.

SECTION 5. IMPACT OF RELIEF ON SURVIVING SPOUSE

.01 Application of DSUE Amount. If the decedent's estate is granted relief under this revenue procedure so that the estate tax return is considered to have been timely filed for purposes of electing portability, the DSUE amount of that decedent is available to the decedent's surviving spouse or the estate of the surviving spouse for application to the surviving spouse's transfers made on or after the decedent's date of death in accordance with the rules prescribed under § 20.2010-3 of the Estate Tax Regulations and § 25.2505-2 of the Gift Tax Regulations. However, if the increase in the surviving spouse's applicable exclusion amount attributable to the addition of the decedent's DSUE amount as of the decedent's date of death results in an overpayment of gift or estate tax by the surviving spouse or his or her estate, no claim for credit or refund may be made if the period of limitations under § 6511(a) for filing a claim for credit or refund of an overpayment of tax with respect to such transfer has expired. That is, an extension of time to elect portability granted under this revenue procedure does not

extend the period during which the surviving spouse or the surviving spouse's estate may make a claim for credit or refund under § 6511(a).

.02 Protective Claim for Credit or Refund of Tax in Anticipation of Relief under this Revenue Procedure. Because a surviving spouse has no DSUE amount from a deceased spouse to apply to such surviving spouse's transfers until the portability election has been made by the deceased spouse's executor (see §§ 20.2010-3(a)(2) and 25.2505-2(a)(2)), a claim for credit or refund of tax filed within the time prescribed in § 6511(a) by the surviving spouse or the estate of the surviving spouse in anticipation of a Form 706 being filed to elect portability pursuant to this revenue procedure will be considered a protective claim for credit or refund of tax.

.03 Examples.

(1) Example 1.

(a) Predeceasing Spouse (S1) dies on January 1, 2014, 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 30, 2014. 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 30, 2014, claiming an applicable exclusion amount of \$5,340,000. S2's executor includes payment of the estate tax with the Form 706.

(c) Pursuant to this revenue procedure, S1's executor files a complete and properly prepared Form 706 on behalf of S1's estate on December 1, 2017, reporting a

DSUE amount of \$5,340,000. The executor includes at the top of the Form 706 the statement required by section 4.01(2) of this revenue procedure. The filing of the return satisfies the requirements for a grant of relief under this revenue procedure and S1's estate is deemed to have made a valid portability election. The Service accepts S1's return with no changes.

(d) To recover the estate tax paid, S2's executor must file a claim for credit or refund of tax by October 30, 2017 (the end of the period of limitations prescribed in § 6511(a)), even though a Form 706 to elect portability has not been filed on behalf of S1's estate by that date. Such a claim filed on Form 843, Claim for Refund and Request for Abatement, 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 Form 843 is filed on or before October 30, 2017, the Service can consider and process that claim for credit or refund of tax once S1's estate is deemed to have made a valid portability election and S2's estate notifies the Service that the claim for credit or refund is ready for consideration.

(2) Example 2.

(a) The facts relating to S1 and S1's estate are the same as in Example 1. S2 makes a gift to Child of \$6,000,000 on December 1, 2014. S2 has made no prior taxable gifts. On April 15, 2015, S2 files a Form 709, United States Gift (and Generation-Skipping Transfer) Tax Return, claiming an applicable exclusion amount of \$5,340,000. S2 tenders payment of the gift tax with the Form 709.

(b) To recover the gift tax paid, S2 must file a claim for credit or refund of tax (protective or otherwise) within the time prescribed in § 6511(a) for filing a claim for credit or refund.

(3) Example 3.

(a) The facts are the same as in Example 2 except that S2's Form 709 claims an applicable exclusion amount of \$10,680,000 including a DSUE amount of \$5,340,000 from S1's estate. As a result, the Form 709 reports no tax due and S2 tenders no gift tax.

(b) Although the portability election, once made, makes S1's DSUE amount available to S2 retroactively to S1's date of death, that DSUE amount is not available until the election is made. Because S2 files the Form 709 before S1's estate makes the portability election, S2's claimed application of the DSUE amount will be denied and gift tax on the transfer will be assessed. To recover that gift tax once the portability election has been made by S1's estate, S2 must file a claim for credit or refund of tax (protective or otherwise) within the time prescribed in § 6511(a) for filing a claim for credit or refund.

SECTION 6. EFFECT ON OTHER DOCUMENTS

Rev. Proc. 2017-3, 2017-1 I.R.B. 130, is amplified.

SECTION 7. EFFECTIVE DATE

.01 In General. This revenue procedure is effective June 9, 2017.

.02 Letter Rulings Will Not Be Issued. Through the later of January 2, 2018, or the second anniversary of a decedent's date of death, the exclusive procedure for obtaining an extension of time under § 301.9100-3 to make a portability election under § 2010(c)(5)(A) for the estate of a decedent, if the decedent and executor meet the

requirements of section 3.01(1)-(3) of this revenue procedure, is the procedure described in section 4.01 of this revenue procedure. If an executor of such an estate 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) and that letter ruling is pending in the National Office on June 9, 2017, the Office of the Associate Chief Counsel (Passthroughs & Special Industries) will close its file on the ruling request and refund the user fee, and the estate may obtain the relief granted by this revenue procedure only by complying with section 4.01 of this revenue procedure.

SECTION 8. 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 at (202) 317-6859 (not a toll-free call).