Outline for Speech to Estate Planning Council on Portability

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I. Introduction

A. What is Portability?

1. The Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 (the "Tax Relief Act of 2010") created portability by providing that the first spouse to die may transfer his or her unused exclusion amount to his or her surviving spouse. This exclusion has become portable, which is why it is referred to as "portability."

2. Portability was electable for decedent's that died in 2011 and may be elected for decedents that die this year (2012).

3. Unless Congress acts to extend portability, the section allowing portability sunsets on December 31, 2012.

II. Background

A. Unified Transfer Tax System

1. The Tax Reform Act of 1976 unified the taxation of all lifetime taxable transfers and all taxable transfers at death.

2. Additionally, the Tax Reform Act of 1976 added Section 2010 to the Internal Revenue Code (the "IRC").

- Section 2010 of the IRC provides a unified credit against estate and gift taxes (the "applicable credit amount").

- The amount of property sheltered by the applicable credit amount is the applicable exclusion amount.

B. The Unlimited Marital Deduction

1. The Economy Recovery Act of 1981 allowed a married couple to only pay the estate tax once by allowing the deferral of the estate tax to the death of the surviving spouse.

C. Planning with the Unified Transfer Tax System and the Unlimited Marital Deduction

1. After the introduction of the unified transfer tax system and the unlimited martial deduction, married couples had the following choices for their estate planning.
   - The first spouse could leave all the property to the surviving spouse, which would defer the estate tax but not avoid or minimize the estate tax; or
   - A married couple could create an A/B estate plan and create a separate credit shelter trust to utilize the first spouse's applicable exclusion amount and then pass the remainder of the property to the surviving spouse using the unlimited martial deduction.

D. Fluctuation of the Applicable Credit Amount and the Applicable Exclusion Amount

Year(s)	**Applicable Credit Amount**	**Applicable Exclusion Amount**
2002-2003	$345,800	$1,000,000
2004-2005	$555,800	$1,500,000
2006-2008	$780,800	$2,000,000
2009	$1,455,800	$3,500,000
2010 (opt-out)	No tax	No tax
2010 (opt-in)	$1,730,800	$5,000,000
2011-2012	$1,730,800	$5,000,000
2013	$345,800	$1,000,000

III. Portability

A. The Basics

1. The Tax Relief Act of 2010 amended Section 2010 of the IRC to create portability by making the applicable exclusion amount equal to (i) the basic exclusion amount ($5,000,000 in 2011) plus, (ii) in the case of a surviving spouse, the deceased spousal unused exclusion amount (the "DSUEA").
2. The Tax Relief Act of 2010 provides a married couple with a combined total of $10,000,000 of possible exemption because the surviving spouse may use the deceased spouse's entire $5,000,000 unused exclusion amount.
3. The Joint Committee on Taxation Technical Explanation states that "...any applicable exclusion amount that remains unused as of the death of a spouse who dies after December 31, 2010 (the 'deceased spousal unused exclusion amount'), generally is available for use by the surviving spouse, as an addition to such surviving spouse's applicable exclusion amount."
4. An Example:
   - Jane died in 2011 and $1,000,000 of assets go to her nonmarital trust for her husband, John.
   - Jane's executor elects to have Jane's $4,000,000 of unused exclusion amount transferred to John.
   - If John takes no further action and dies this year (2012), John would have a total of $9,000,000 of applicable exclusion amount that could shelter property from the estate tax.

5. Regardless of the size of the estate or the reason that a decedent has unused exclusion amount, portability is available.

6. Examples:

   - John dies with a $3,000,000 estate that is taxable. This leaves $2,000,000 of unused exclusion that is portable to John's spouse.

   - Jane dies with an $27,000,000 estate and leaves $3,000,000 to her children and the remaining $24,000,000 to her husband. There is $2,000,000 of unused exclusion that is portable.

7. The Tax Relief Act of 2010 also amended Section 2505 of the IRC, Unified Credit Against Gift Tax to define the credit for gift tax purposes as "the applicable credit amount in effect under section 2010(c) which would apply if the donor died as of the end of the calendar year." Accordingly, a surviving spouse may use his or her applicable exclusion amount plus a DSUEA to make lifetime gifts.

8. Portability does not apply to the GST exemption. The Tax Relief Act of 2010 amended Section 2631(c) of the IRC to provide that "the GST exemption amount for any calendar year shall be equal to the basic exclusion amount under section 2010(c) for such calendar year."

9. For 2011, the basic exclusion amount was $5,000,000. For this year (2012), the basic exclusion amount has been increased for inflation up to $5,120,000. For purposes of this outline, we'll just use the $5,000,000 and ignore the inflation adjustment.

B. The Deceased Spousal Unused Exclusion Amount (the "DSUEA")

1. Section 2010(c)(4) of the IRC defines the DSUEA as the lesser of:

   - the basic exclusion amount, or

- the excess of the basic exclusion amount of the last such deceased spouse of such surviving spouse, over the amount with respect to which the tentative tax is determined under section 2001(b)(1) on the estate of such deceased spouse (the deceased spouse's unused basic exclusion amount).

2. Only applies to the unused exclusion amount for a deceased spouse dying after December 31, 2010.
3. Section 2010(c)(4) limits the surviving spouse's use of the unused exclusion amount of the surviving spouse's <u>last</u> deceased spouse.
4. Examples:
   - John dies in 2011. Before John's death, he made $2,000,000 worth of transfers. At John's death, he had no taxable estate. An election is made for Jane to use John's DSUEA of $3,000,000. As of John's death, Jane has an applicable exclusion amount of $8,000,000 (Jane's $5,000,000 basic exclusion amount plus John's $3,000,000), which Jane may use for lifetime gifts or at her death.
   - Assume the same facts as above, except that Jane marries Mark after John's death. A couple of months later, Mark dies having made $3,000,000 in lifetime transfers and with no taxable estate. An election is made for Jane to use Mark's DSUEA of $2,000,000. Although the combined amount of John's and Mark's DSUEA is $5,000,000, Jane is limited to Mark's $2,000,000 DSUEA. Now, Jane's exemption amount is $7,000,000 (Jane's $5,000,000 basic exclusion amount plus Mark's $2,000,000), which Jane may use for lifetime gifts or at her death.

C. Making the Election

1. Section 2010(c)(5) of the IRC requires the executor of the deceased spouse's estate (i) file an estate tax return and (ii) elect, in order to make the deceased spouse's unused exclusion amount portable.

2. Once made the election is irrevocable and must be made on a timely filed return.

3. Notice 2011-82 contains the IRS's initial guidance on making the election.

   - The IRS will consider the election automatic if the Form 706 is filed - there is no box to check.

   - The IRS has contemplated revising the Form 706 to expressly contain the computation of the DSUEA. Until the IRS revises the Form 706, a complete and properly-prepared Form 706 will be deemed to contain the computation of the DSUEA.

   - If the executor 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.

   - If the executor is required to file a Form 706 and chooses not to make the portability election, the executor must follow the steps on the Form 706 for not electing portability.

     ➢ The current instructions for Form 706 state that if the estate chooses not to allow the surviving spouse to take into account, for estate and gift tax purposes, the DSUEA, then executors should do one of the following: (i) attach a statement to the Form 706 indicating that the estate is not making the election under Section 2010(c)(5) or (ii) enter

"No Election Under 2010(c)(5)" across the top of the first page of Form 706

4. The Treasury may create an abbreviated Form 706 for those estates for which the only purpose of filing is to make the election for portability under Section 2010(c)(5).
5. The Tax Relief Act of 2010 added Section 2010(c)(5)(B) of the IRC, which provides that if the portability election is made, there is no statute of limitations for examining the deceased spouse's Form 706, but only for determining the amount of DSUEA available to the surviving spouse. Accordingly, if the statute of limitations period under Section 6501 of the IRC has expired, the IRS will not be able to increase the deceased spouse's estate tax liability; however, the IRS could make adjustments to the decease spouse's return that would result in a decreased DSUEA.

D. An Inconsistency

1. Under the language of Section 2010 of the IRC, if John dies and Jane remarries, Jane's new spouse, Mark, may not use the DSUEA Jane received from John. This is sometimes referred to as the "privity" requirement.
    - Example: John dies and Jane receives John's DSUEA, then Jane marries Mark. If Jane dies before Mark, Mark may then use Jane's DSUEA from Jane's unused basic exclusion amount, but may not utilize any of John's DSUEA.
2. The definition of the "deceased spousal unused exclusion amount" has no element that might include a deceased person's unused exclusion from a prior spouse in determining how much unused exclusion can be used by a surviving spouse.
3. However, Example 3 in the Joint Committee on Taxation Technical Explanation of the Revenue Provisions contained in the Tax Relief Act of 2010 provides the following:

- John dies with $2 million of unused exclusion amount. Following John's death, Jane's applicable exclusion amount is $7 million (her $5 million basic exclusion amount plus $2 million DSUEA from John). Jane made no taxable transfers and has a taxable estate of $3 million. An election is made on Jane's estate tax return to permit Mark (husband #2) to use Jane's DSUEA, which is $4 million (Jane's $7 million applicable exclusion amount less her $3 million taxable estate). Under the provision, Mark's applicable exclusion amount is increased by $4 million, i.e., the amount of DSUEA of Jane.
- This example assumes that Jane's DSUEA available for use by Mark is Jane's $7 million exclusion amount (which includes the deceased spousal unused exclusion from John) less Jane's $3 million taxable estate.
- In March 2011, the Joint Committee on Taxation noted that a technical correction may be necessary to Section 2010(c)(4)(B) to replace the reference to the basic exclusion amount of the last deceased spouse of the surviving spouse with a reference to the applicable exclusion amount of such last deceased spouse, so that the statute reflects the intent of the drafters.
- This example conflicts with the current statute and is not something estate planners should rely on.

E. Clawback Issues/Clarification Points

1. Lifetime Gifts Followed by a New Spouse

    - Jane acquired a $3,000,000 DSUEA when John died last year (2011), plus Jane uses her basic exclusion amount of $5,000,000 this year (2012) to give away a total of $8,000,000. Then, Jane marries Mark. Mark dies before Jane and leaves his entire $10,000,000 estate to his children. Upon Mark's death, Jane's DSUEA is now zero ($0.00) under Section 2010(c)(4) of the IRC because Jane's last deceased spouse is Mark, not John. When Jane dies with a taxable estate of $3,000,000, plus lifetime gifts of $8,000,000, she has a total estate of $11,000,0000. What is the estate tax due on Jane's death? In effect, Jane is paying a tax on the gift she made using John's $3,000,000 DSUEA. The IRS needs to clarify.

  - ACTEC has asked the IRS "whether the gift taxes that are offset with applicable exclusion amount attributable to DSUEA are treated as gift taxes payable under Section 2001(b)(2), even if that DSUEA is later reduced by remarriage and survival of a later spouse."

- If Jane acquires and uses $3,000,000 of DSUEA from John and then acquires an additional $4,000,000 of DSUEA from Mark. Under Section 2010(c)(4)(A), Jane would be limited to $5,000,000, which is the basic exclusion amount and may only use an additional $2,000,000 from Mark given that she already received $3,000,000 from John.

2. Reduction in the Applicable Exclusion Amount

- What if Congress allows the Tax Relief Act of 2010 to sunset, or Congress lowers the applicable exclusion amount back to $3,500,000 or lower?
- Will transfer tax on the transfer sheltered by the 2011-2012 $5,000,000 be recaptured at death?
  - Example: John makes a $5,000,000 gift in 2011 using his applicable exclusion amount. John dies in 2013 and the exclusion amount is $1,000,000. John has a $10,000,000 estate, the tentative tax calculated

under Section 2001 of the IRC is based on the taxable estate of $10,000,000 plus John's lifetime gifts of $5,000,000.

  - If the applicable exclusion amount is reduced, many commentators believe that this issue will be resolved on future Form 706s.

- The same issue exists with a surviving spouse that receives DSUEA. If the applicable exclusion amount is reduced and portability is kept, the surviving spouse may have his or her basic exclusion amount and the DSUEA reduced.

F. Electing Portability - Some Practical Issues

1. Notice 2011-82 provides guidance on making the portability election and states that the executor of a decedent that wants to make the portability election needs to file "a complete Form 706 within the time prescribed by law (including extensions)"

2. While requiring a complete Form 706 is a burden on estates not required to file an estate tax return, the filing of the Form 706 is a statutory requirement.

3. Many practitioners are lobbying for a short Form 706 for estates that are not required to file an estate tax return, but want to make the portability election.

   - Some practitioners have reported filing a full Form 706 without many of the supporting exhibits to make the election when they have a non-taxable estate.

     - Audit Risk.

     - IRS could deny the portability election because the return is inadequate

   - ACTEC has recommended that the IRS adopt guidelines for a short form 706 for non-taxable estates.

4. Issues may arise regarding the IRS's right to examine, after the statute of limitations has run, the Form 706 of a predeceased spouse to determine the proper amount of DSUEA.

    - Depending on the age of the spouses, this could be a very long time. How would the estate of the surviving spouse provide additional support for its position with regards to the DSUEA if the surviving spouse dies 10, 30, or 50+ years after the predeceases spouse?

IV. Planning with Portability

A. Planning Through the End of This Year (2012)

1. Because portability is scheduled to expire at the end of this year, nobody should be relying on it as part of an estate plan; however, Congress could act to extend portability, at least temporarily, so portability should not be ignored.
2. What happens if portability goes away at the end of this year?
    - Absent Congressional action, the sunset of the Tax Relief Act of 2010 will eliminate the DSUEA unless both spouses died in 2011 or 2012.
    - What happens to the DSUEA already obtained by a surviving spouse?

B. Which estates should elect portability?

1. Obviously, estates where the couple is close to the threshold for incurring estate tax.
2. For estates that are significantly under the threshold, the question becomes more difficult given that the expense of preparing a Form 706 can be large and the DSUEA may not make a difference upon the death of the surviving spouse.

3. A case by case analysis given the length of time the surviving spouse may survive, what type of assets the surviving spouse now owns, any other inheritance the surviving spouse may receive, etc…
4. Probably a good idea for estates with property in states like New York that require the filing of a Form 706 with the state. The additional cost of filing with the federal government is minimal and the Form 706 will already be prepared.

C. What if portability is made permanent?

1. Permanent portability would provide estate planners with an alternative to the more traditional estate planning in which practitioners create credit shelter trusts and focus on the proper titling of assets.
2. In most cases, traditional estate planning will be a preferable method to using portability.
3. Portability would be a great Plan B in situations where a couple fails to plan to utilize their applicable exclusion amount.

D. Advantages of Traditional Estate Planning

1. Asset Appreciation
    - Because the DSUEA is not adjusted for inflation, credit shelter trusts create more opportunities for shifting future appreciation in assets without estate tax consequences for the surviving spouse.
2. GST Planning
    - The GST exemption is not portable. Accordingly, a couple seeking to increase the amount of property held in long term trusts for descendants will want to continue to use traditional estate planning methods.

3. Remarriage

    - A surviving spouse may lose his or her DSUEA if he or she remarries and the second spouse also predeceases him or her.

4. Asset Protection

    - Trusts provide spendthrift provisions
    - Trust assets are protected from creditors' claims

5. Planning for a closely held business

    - A credit shelter trust also provides a family with the ability to put voting control outside of the estate or divide a controlling interest so that voting control of a company does not end up in the hands of the surviving spouse at his or her death

E. Advantages of Portability

1. It's simple to use and allows a couple to create a simple estate plan that leaves all of the decease spouse's property to the surviving spouse while preserving the DSUEA.

    - This allows a decedent to transfer wealth to their surviving spouse instead of leaving it for other beneficiaries. A credit shelter trust leaves the remainder beneficiaries with rights.

2. There may be substantial tax savings when the poorer spouse dies first

    - Example: Wife has $1,000,000 worth of assets and Husband has $15,000,000. If Wife dies first, Husband receives a $4,000,000 DSUEA to use to give way property.

3. Another Basis Step Up at Death of the Surviving Spouse

   - Assets passing to the surviving spouse will get another basis step-up at the death of the surviving spouse under Section 1014 of the IRC.

4. Depreciating Assets

   - If the deceased spouse's estate has assets that will likely depreciate in value over the surviving spouse's lifetime, then portability may be preferable to putting the assets in a credit shelter trust.

5. Retirement Assets

   - While credit shelter trusts are often preferable for traditional asset classes such as real estate and stock, portability is generally a better option for retirement plan accounts.
     - ➢ IRAs are examples of depreciating assets that would waste a decedent's applicable exclusion amount.
   - Generally, if a couple wants the surviving spouse to have access to a decedent's retirement assets, the best income tax planning will be for the surviving spouse to be named as a beneficiary of the account and for the surviving spouse to roll over the decedent's retirement account in the surviving spouse's own name.
     - ➢ This results in a negative estate tax outcome because the retirement assets will be included in the surviving spouse's estate.
   - If retirement assets are given to a beneficiary (aside from the surviving spouse), the beneficiary's optimal tax outcome will be to classify the account as an inherited IRA, but then the beneficiary must take distributions over his or her remaining life expectancy.

- Portability offers the income tax advantage of the rollover to the surviving spouse with the estate tax benefit that on the death of the surviving spouse, the surviving spouse's estate may use the DSUEA of the deceased first spouse.
- With portability, couples with a large amount of retirement assets are able to take advantage of the income tax benefits of rolling the retirement assets over to the surviving spouse without incurring an estate tax penalty.

F. Using Portability to Increase Flexibility for Credit Shelter Trusts

1. Estate planning practitioners are figuring out methods to draft credit shelter trusts that utilize some of the additional basis step-up that is available with portability.
   - By including assets from a credit shelter trust in the estate of the surviving spouse without going over the applicable exclusion amount, the assets may obtain an additional basis step up at the death of the surviving spouse.
   - Drafting to cause inclusion of appreciated assets in a surviving spouse's estate to utilize a surviving spouse's DSUEA.
   - May result in assets going to beneficiaries not selected by the decedent if the power given to an independent trustee to make distributions to the surviving spouse to reduce income taxes.

G. Lifetime Gifts and Portability

1. A surviving spouse should try to utilize the DSUEA with gifts as soon as possible. This is especially true if the surviving spouse plans to remarry because the surviving spouse may end up with less of a DSUEA if the new spouse predeceases him or her or if Congress reduces the amount of DSUEA available under the IRC.

H. Provisions in Nuptial Agreements

1. In prenuptial or postnuptial agreements, spouses may want to determine how the benefit of the DSUEA will be utilized.

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I.R.C. § 2001

Effective: December 17, 2010

United States Code Annotated Currentness
Title 26. Internal Revenue Code (Refs & Annos)
Subtitle B. Estate and Gift Taxes (Refs & Annos)
Chapter 11. Estate Tax (Refs & Annos)
Subchapter A. Estates of Citizens or Residents
Part I. Tax Imposed
§ 2001. Imposition and rate of tax

(a) Imposition.--A tax is hereby imposed on the transfer of the taxable estate of every decedent who is a citizen or resident of the United States.

(b) Computation of tax.--The tax imposed by this section shall be the amount equal to the excess (if any) of--

(1) a tentative tax computed under subsection (c) on the sum of--

(A) the amount of the taxable estate, and

(B) the amount of the adjusted taxable gifts, over

(2) the aggregate amount of tax which would have been payable under chapter 12 with respect to gifts made by the decedent after December 31, 1976, if the modifications described in subsection (g) had been applicable at the time of such gifts.

For purposes of paragraph (1)(B), the term "adjusted taxable gifts" means the total amount of the taxable gifts (within the meaning of section 2503) made by the decedent after December 31, 1976, other than gifts which are includible in the gross estate of the decedent.

(c) Rate schedule.--

If the amount with respect to which the tentative tax to be computed is:	The tentative tax is:
Not over $10,000	18 percent of such amount.
Over $10,000 but not over $20,000	$1,800, plus 20 percent of the excess of such amount over $10,000.
Over $20,000 but not over $40,000	$3,800, plus 22 percent of the excess of such amount over $20,000.

Over $40,000 but not over $60,000	$8,200, plus 24 percent of the excess of such amount over $40,000.
Over $60,000 but not over $80,000	$13,000, plus 26 percent of the excess of such amount over $60,000.
Over $80,000 but not over $100,000	$18,200, plus 28 percent of the excess of such amount over $80,000.
Over $100,000 but not over $150,000	$23,800, plus 30 percent of the excess of such amount over $100,000.
Over $150,000 but not over $250,000	$38,800, plus 32 percent of the excess of such amount over $150,000.
Over $250,000 but not over $500,000	$70,800, plus 34 percent of the excess of such amount over $250,000.
Over $500,000	$155,800, plus 35 percent of the excess of such amount over $500,000.

(d) Adjustment for gift tax paid by spouse.--For purposes of subsection (b)(2), if--

(1) the decedent was the donor of any gift one-half of which was considered under section 2513 as made by the decedent's spouse, and

(2) the amount of such gift is includible in the gross estate of the decedent,

any tax payable by the spouse under chapter 12 on such gift (as determined under section 2012(d)) shall be treated as a tax payable with respect to a gift made by the decedent.

(e) Coordination of sections 2513 and 2035.--If--

(1) the decedent's spouse was the donor of any gift one-half of which was considered under section 2513 as made by the decedent, and

(2) the amount of such gift is includible in the gross estate of the decedent's spouse by reason of section 2035,

such gift shall not be included in the adjusted taxable gifts of the decedent for purposes of subsection (b)(1)(B), and the aggregate amount determined under subsection (b)(2) shall be reduced by the amount (if any) determined under subsection (d) which was treated as a tax payable by the decedent's spouse with respect to such gift.

(f) Valuation of gifts.--

(1) In general.--If the time has expired under section 6501 within which a tax may be assessed under chapter 12 (or under corresponding provisions of prior laws) on--

(A) the transfer of property by gift made during a preceding calendar period (as defined in section 2502(b)); or

(B) an increase in taxable gifts required under section 2701(d), the value thereof shall, for purposes of computing the tax under this chapter, be the value as finally determined for purposes of chapter 12.

(2) Final determination.--For purposes of paragraph (1), a value shall be treated as finally determined for purposes of chapter 12 if--

(A) the value is shown on a return under such chapter and such value is not contested by the Secretary before the expiration of the time referred to in paragraph (1) with respect to such return;

(B) in a case not described in subparagraph (A), the value is specified by the Secretary and such value is not timely contested by the taxpayer; or

(C) the value is determined by a court or pursuant to a settlement agreement with the Secretary.

For purposes of subparagraph (A), the value of an item shall be treated as shown on a return if the item is disclosed in the return, or in a statement attached to the return, in a manner adequate to apprise the Secretary of the nature of such item.

(g) Modifications to gift tax payable to reflect different tax rates.--For purposes of applying subsection (b)(2) with respect to 1 or more gifts, the rates of tax under subsection (c) in effect at the decedent's death shall, in lieu of the rates of tax in effect at the time of such gifts, be used both to compute--

(1) the tax imposed by chapter 12 with respect to such gifts, and

(2) the credit allowed against such tax under section 2505, including in computing--

(A) the applicable credit amount under section 2505(a)(1), and

(B) the sum of the amounts allowed as a credit for all preceding periods under section 2505(a)(2).

CREDIT(S)

(Aug. 16, 1954, c. 736, 68A Stat. 373; Oct. 4, 1976, Pub.L. 94-455, Title XX, § 2001(a)(1), 90 Stat. 1846; Nov. 6, 1978, Pub.L. 95-600, Title VII, § 702(h)(1), 92 Stat. 2930; Aug. 13, 1981, Pub.L. 97-34, Title IV, § 402(a) to (c), 95 Stat. 300; July 18, 1984, Pub.L. 98-369, Div. A, Title I, § 21(a), 98 Stat. 506; Dec. 22, 1987, Pub.L. 100-203, Title X, § 10401(a), (b)(1), (2)(A), 101 Stat. 1330-430; Aug. 10, 1993, Pub.L. 103-66, Title XIII, § 13208(a), (b)(1), (2), 107 Stat. 469; Aug. 5, 1997, Pub.L. 105-34, Title V, §§ 501(a)(1)(D), 506(a), 111 Stat. 845, 855; July 22, 1998, Pub.L. 105-206, Title VI, § 6007(e)(2)(B), 112 Stat. 810; Oct. 21, 1998, Pub.L. 105-277, Div. J, Title IV, § 4003(c), 112 Stat. 2681-909; June 7, 2001, Pub.L. 107-16, Title V, § 511(a) to (c), 115 Stat. 70; Pub.L. 111-312, Title III, § 302(a)(2), (d)(1), Dec. 17, 2010, Stat. 3301, 3302.)

TERMINATION OF AMENDMENTS

<Pub.L. 107-16, § 901 shall apply to amendments made by Pub.L. 111-312, Title III, § 301 et seq., see Pub.L. 111-312, § 304, set out as a Sunset Provisions note under 26 U.S.C.A. § 121.>

Effective: December 17, 2010

United States Code Annotated Currentness
Title 26. Internal Revenue Code (Refs & Annos)
Subtitle B. Estate and Gift Taxes (Refs & Annos)
Chapter 11. Estate Tax (Refs & Annos)
Subchapter A. Estates of Citizens or Residents
Part II. Credits Against Tax (Refs & Annos)

→→ § 2010. Unified credit against estate tax

(a) General rule.--A credit of the applicable credit amount shall be allowed to the estate of every decedent against the tax imposed by section 2001.

(b) Adjustment to credit for certain gifts made before 1977.--The amount of the credit allowable under subsection (a) shall be reduced by an amount equal to 20 percent of the aggregate amount allowed as a specific exemption under section 2521 (as in effect before its repeal by the Tax Reform Act of 1976) with respect to gifts made by the decedent after September 8, 1976.

(c) Applicable credit amount.--

(1) In general.--For purposes of this section, the applicable credit amount is the amount of the tentative tax which would be determined under section 2001(c) if the amount with respect to which such tentative tax is to be computed were equal to the applicable exclusion amount.

(2) Applicable exclusion amount.--For purposes of this subsection, the 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.

(3) Basic exclusion amount.--

(A) In general.--For purposes of this subsection, the basic exclusion amount is $5,000,000.

(B) Inflation adjustment.--In the case of any decedent dying in a calendar year after 2011, the dollar amount in subparagraph (A) shall be increased by an amount equal to--

(i) such dollar amount, multiplied by

(ii) the cost-of-living adjustment determined under section 1(f)(3) for such calendar year by substituting "calendar year 2010" for "calendar year 1992" in subparagraph (B) thereof.

If any amount as adjusted under the preceding sentence is not a multiple of $10,000, such amount shall be rounded to the nearest multiple of $10,000.

(4) Deceased spousal unused exclusion amount.--For purposes of this subsection, with respect to a surviving spouse of a deceased spouse dying after December 31, 2010, the term "deceased spousal unused exclusion amount" means 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.

(5) Special rules.--

(A) Election required.--A deceased spousal unused exclusion amount may not be taken into account by a surviving spouse under paragraph (2) unless the executor of the estate of the deceased spouse files an estate tax return on which such amount is computed and makes an election on such return that such amount may be so taken into account. Such election, once made, shall be irrevocable. No election may be made under this subparagraph if such return is filed after the time prescribed by law (including extensions) for filing such return.

(B) Examination of prior returns after expiration of period of limitations with respect to deceased spousal unused exclusion amount.--Notwithstanding any period of limitation in section 6501, after the time has expired under section 6501 within which a tax may be assessed under chapter 11 or 12 with respect to a deceased spousal unused exclusion amount, the Secretary may examine a return of the deceased spouse to make determinations with respect to such amount for purposes of carrying out this subsection.

(6) Regulations.--The Secretary shall prescribe such regulations as may be necessary or appropriate to carry out this subsection.

(d) Limitation based on amount of tax.--The amount of the credit allowed by subsection (a) shall not exceed the amount of the tax imposed by section 2001.

CREDIT(S)

(Added Pub.L. 94-455, Title XX, § 2001(a)(2), Oct. 4, 1976, 90 Stat. 1848; amended Pub.L. 97-34, Title IV, § 401(a)(1), (2)(A), Aug. 13, 1981, 95 Stat. 299; Pub.L. 101-508, Title XI, §§ 11801(a)(39), (c)(19)(A), Nov. 5, 1990, 104 Stat. 1388-521, 1388-528; Pub.L. 105-34, Title V, §§ 501(a)(1)(A), (B), Aug. 5, 1997, 111 Stat. 845; Pub.L. 107-16, Title V, § 521(a), June 7, 2001, 115 Stat. 71; Pub.L. 111-312, Title III, §§ 302(a)(1), 303(a), Dec. 17, 2010, 124 Stat. 3301, 3302.)

TERMINATION OF AMENDMENTS

<Pub.L. 107-16, § 901 shall apply to amendments made by Pub.L. 111-312, Title III, § 301 et seq., see Pub.L.

I.R.C. § 2056

Effective: August 5, 1997

United States Code Annotated Currentness
Title 26. Internal Revenue Code (Refs & Annos)
Subtitle B. Estate and Gift Taxes (Refs & Annos)
Chapter 11. Estate Tax (Refs & Annos)
Subchapter A. Estates of Citizens or Residents
Part IV. Taxable Estate

§ 2056. Bequests, etc., to surviving spouse

(a) Allowance of marital deduction.--For purposes of the tax imposed by section 2001, the value of the taxable estate shall, except as limited by subsection (b), be 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 his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate.

(b) Limitation in the case of life estate or other terminable interest.--

(1) General rule.--Where, on the lapse of time, on the occurrence of an event or contingency, or on the failure of an event or contingency to occur, an interest passing to the surviving spouse will terminate or fail, no deduction shall be allowed under this section with respect to such interest--

(A) if an interest in such property passes or has passed (for less than an adequate and full consideration in money or money's worth) from the decedent to any person other than such surviving spouse (or the estate of such spouse); and

(B) if by reason of such passing such person (or his heirs or assigns) may possess or enjoy any part of such property after such termination or failure of the interest so passing to the surviving spouse;

and no deduction shall be allowed with respect to such interest (even if such deduction is not disallowed under subparagraphs (A) and (B))--

(C) if such interest is to be acquired for the surviving spouse, pursuant to directions of the decedent, by his executor or by the trustee of a trust.

For purposes of this paragraph, an interest shall not be considered as an interest which will terminate or fail merely because it is the ownership of a bond, note, or similar contractual obligation, the discharge of which would not have the effect of an annuity for life or for a term.

(2) Interest in unidentified assets.--Where the assets (included in the decedent's gross estate) out of which, or the proceeds of which, an interest passing to the surviving spouse may be satisfied include a particular asset or assets with respect to which no deduction would be allowed if such asset or assets passed from the decedent to such spouse, then the value of such interest passing to such spouse shall, for purposes of subsection (a), be reduced by the aggregate value of such particular assets.

(3) Interest of spouse conditional on survival for limited period.--For purposes of this subsection, an interest passing to the surviving spouse shall not be considered as an interest which will terminate or fail on the death of such spouse if--

(A) such death will cause a termination or failure of such interest only if it occurs within a period not exceeding 6 months after the decedent's death, or only if it occurs as a result of a common disaster resulting in the death of the decedent and the surviving spouse, or only if it occurs in the case of either such event; and

(B) such termination or failure does not in fact occur.

(4) Valuation of interest passing to surviving spouse.--In determining for purposes of subsection (a) the value of any interest in property passing to the surviving spouse for which a deduction is allowed by this section--

(A) there shall be taken into account the effect which the tax imposed by section 2001, or any estate, succession, legacy, or inheritance tax, has on the net value to the surviving spouse of such interest; and

(B) where such interest or property is encumbered in any manner, or where the surviving spouse incurs any obligation imposed by the decedent with respect to the passing of such interest, such encumbrance or obligation shall be taken into account in the same manner as if the amount of a gift to such spouse of such interest were being determined.

(5) Life estate with power of appointment in surviving spouse.--In the case of an interest in property passing from the decedent, if his surviving spouse is entitled for life to all the income from the entire interest, or all the income from a specific portion thereof, payable annually or at more frequent intervals, with power in the surviving spouse to appoint the entire interest, or such specific portion (exercisable in favor of such surviving spouse, or of the estate of such surviving spouse, or in favor of either, whether or not in each case the power is exercisable in favor of others), and with no power in any other person to appoint any part of the interest, or such specific portion, to any person other than the surviving spouse--

(A) the interest or such portion thereof so passing shall, for purposes of subsection (a), be considered as passing to the surviving spouse, and

(B) no part of the interest so passing shall, for purposes of paragraph (1)(A), be considered as passing to any person other than the surviving spouse.

This paragraph shall apply only if such power in the surviving spouse to appoint the entire interest, or such specific portion thereof, whether exercisable by will or during life, is exercisable by such spouse alone and in all events.

(6) Life insurance or annuity payments with power of appointment in surviving spouse.--In the case of an interest in property passing from the decedent consisting of proceeds under a life insurance, endowment, or annuity contract, if under the terms of the contract such proceeds are payable in installments or are held by the insurer subject to an agreement to pay interest thereon (whether the proceeds, on the termination of any interest payments, are payable in a lump sum or in annual or more frequent installments), and such installment or interest payments are payable annually or at more frequent intervals, commencing not later than 13 months after the decedent's death, and all amounts, or a specific portion of all such amounts, payable during the life of the surviving spouse are payable only to such spouse, and such spouse has the power to appoint all amounts, or such specific portion, payable under such contract (exercisable in favor of such surviving spouse, or of the estate of such surviving spouse, or in favor of either, whether or not in each case the power is exercisable in favor of others), with no power in any other person to appoint such amounts to any person other than the surviving spouse--

(A) such amounts shall, for purposes of subsection (a), be considered as passing to the surviving spouse, and

(B) no part of such amounts shall, for purposes of paragraph (1)(A), be considered as passing to any person other than the surviving spouse.

This paragraph shall apply only if, under the terms of the contract, such power in the surviving spouse to appoint such amounts, whether exercisable by will or during life, is exercisable by such spouse alone and in all events.

(7) Election with respect to life estate for surviving spouse.--

(A) In general.--In the case of qualified terminable interest property--

(i) for purposes of subsection (a), such property shall be treated as passing to the surviving spouse, and

(ii) for purposes of paragraph (1)(A), no part of such property shall be treated as passing to any person other than the surviving spouse.

(B) Qualified terminable interest property defined.--For purposes of this paragraph--

(i) In general.--The term "qualified terminable interest property" means property--

(I) which passes from the decedent,

(II) in which the surviving spouse has a qualifying income interest for life, and

(III) to which an election under this paragraph applies.

(ii) Qualifying income interest for life.--The surviving spouse has a qualifying income interest for life if--

(I) the surviving spouse is entitled to all the income from the property, payable annually or at more frequent intervals, or has a usufruct interest for life in the property, and

(II) no person has a power to appoint any part of the property to any person other than the surviving spouse.

Subclause (II) shall not apply to a power exercisable only at or after the death of the surviving spouse. To the extent provided in regulations, an annuity shall be treated in a manner similar to an income interest in property (regardless of whether the property from which the annuity is payable can be separately identified).

(iii) Property includes interest therein.--The term "property" includes an interest in property.

(iv) Specific portion treated as separate property.--A specific portion of property shall be treated as separate property.

(v) Election.--An election under this paragraph with respect to any property shall be made by the executor on the return of tax imposed by section 2001. Such an election, once made, shall be irrevocable.

(C) Treatment of survivor annuities.--In the case of an annuity included in the gross estate of the decedent under section 2039 (or, in the case of an interest in an annuity arising under the community property laws of a State, included in the gross estate of the decedent under section 2033) where only the surviving spouse has the right to receive payments before the death of such surviving spouse--

(i) the interest of such surviving spouse shall be treated as a qualifying income interest for life, and

(ii) the executor shall be treated as having made an election under this subsection with respect to such annuity unless the executor otherwise elects on the return of tax imposed by section 2001.

An election under clause (ii), once made, shall be irrevocable.

(8) Special rule for charitable remainder trusts.--

(A) In general.--If the surviving spouse of the decedent is the only beneficiary of a qualified charitable remainder trust who is not a charitable beneficiary nor an ESOP beneficiary, paragraph (1) shall not apply to any interest in such trust which passes or has passed from the decedent to such surviving spouse.

(B) Definitions.--For purposes of subparagraph (A)--

(i) Charitable beneficiary.--The term "charitable beneficiary" means any beneficiary which is an organization described in section 170(c).

(ii) ESOP beneficiary.--The term "ESOP beneficiary" means any beneficiary which is an employee stock ownership plan (as defined in section 4975(e)(7)) that holds a remainder interest in qualified employer securities (as defined in section 664(g)(4)) to be transferred to such plan in a qualified gratuitous transfer (as defined in section 664(g)(1)).

(iii) Qualified charitable remainder trust.--The term "qualified charitable remainder trust" means a charitable remainder annuity trust or a charitable remainder unitrust (described in section 664).

(9) Denial of double deduction.--Nothing in this section or any other provision of this chapter shall allow the value of any interest in property to be deducted under this chapter more than once with respect to the same decedent.

(10) Specific portion.--For purposes of paragraphs (5), (6), and (7)(B)(iv), the term "specific portion" only includes a portion determined on a fractional or percentage basis.

(c) Definition.--For purposes of this section, an interest in property shall be considered as passing from the decedent to any person if and only if--

(1) such interest is bequeathed or devised to such person by the decedent;

(2) such interest is inherited by such person from the decedent;

(3) such interest is the dower or curtesy interest (or statutory interest in lieu thereof) of such person as surviving spouse of the decedent;

(4) such interest has been transferred to such person by the decedent at any time;

(5) such interest was, at the time of the decedent's death, held by such person and the decedent (or by them and any other person) in joint ownership with right of survivorship;

(6) the decedent had a power (either alone or in conjunction with any person) to appoint such interest and if he appoints or has appointed such interest to such person, or if such person takes such interest in default on the release or nonexercise of such power; or

(7) such interest consists of proceeds of insurance on the life of the decedent receivable by such person.

Except as provided in paragraph (5) or (6) of subsection (b), where at the time of the decedent's death it is not possible to ascertain the particular person or persons to whom an interest in property may pass from the decedent, such interest shall, for purposes of subparagraphs (A) and (B) of subsection (b)(1), be considered as passing from the decedent to a person other than the surviving spouse.

(d) Disallowance of marital deduction where surviving spouse not United States citizen.--

(1) In general.--Except as provided in paragraph (2), if the surviving spouse of the decedent is not a citizen of the United States--

(A) no deduction shall be allowed under subsection (a), and

(B) section 2040(b) shall not apply.

(2) Marital deduction allowed for certain transfers in trust.--

(A) In general.--Paragraph (1) shall not apply to any property passing to the surviving spouse in a qualified domestic trust.

(B) Special rule.--If any property passes from the decedent to the surviving spouse of the decedent, for purposes of subparagraph (A), such property shall be treated as passing to such spouse in a qualified domestic trust if--

(i) such property is transferred to such a trust before the date on which the return of the tax imposed by this chapter is made, or

(ii) such property is irrevocably assigned to such a trust under an irrevocable assignment made on or before such date which is enforceable under local law.

(3) Allowance of credit to certain spouses.--If--

(A) property passes to the surviving spouse of the decedent (hereinafter in this paragraph referred to as the "first decedent"),

(B) without regard to this subsection, a deduction would be allowable under subsection (a) with respect to such property, and

(C) such surviving spouse dies and the estate of such surviving spouse is subject to the tax imposed by this chapter,

the Federal estate tax paid (or treated as paid under section 2056A(b)(7)) by the first decedent with respect to such property shall be allowed as a credit under section 2013 to the estate of such surviving spouse and the amount of such credit shall be determined under such section without regard to when the first decedent died and without regard to subsection (d)(3) of such section.

(4) Special rule where resident spouse becomes citizen.--Paragraph (1) shall not apply if--

(A) the surviving spouse of the decedent becomes a citizen of the United States before the day on which the return of the tax imposed by this chapter is made, and

(B) such spouse was a resident of the United States at all times after the date of the death of the decedent and before becoming a citizen of the United States.

(5) Reformations permitted.

(A) In general.--In the case of any property with respect to which a deduction would be allowable under subsection (a) but for this subsection, the determination of whether a trust is a qualified domestic trust shall be made--

(i) as of the date on which the return of the tax imposed by this chapter is made, or

(ii) if a judicial proceeding is commenced on or before the due date (determined with regard to extensions) for filing such return to change such trust into a trust which is a qualified domestic trust, as of the time when the changes pursuant to such proceeding are made.

(B) Statute of limitations.--If a judicial proceeding described in subparagraph (A)(ii) is commenced with respect to any trust, the period for assessing any deficiency of tax attributable to any failure of such trust to be a qualified domestic trust shall not expire before the date 1 year after the date on which the Secretary is notified that the trust has been changed pursuant to such judicial proceeding or that such proceeding has been terminated.

Effective: January 1, 2011

United States Code Annotated Currentness
Title 26. Internal Revenue Code (Refs & Annos)
Subtitle B. Estate and Gift Taxes (Refs & Annos)
Chapter 12. Gift Tax (Refs & Annos)
Subchapter A. Determination of Tax Liability
§ 2505. Unified credit against gift tax

(a) General rule.--In the case of a citizen or resident of the United States, there shall be allowed as a credit against the tax imposed by section 2501 for each calendar year an amount equal to--

(1) the applicable credit amount in effect under section 2010(c) which would apply if the donor died as of the end of the calendar year, reduced by

(2) the sum of the amounts allowable as a credit to the individual under this section for all preceding calendar periods.

For purposes of applying paragraph (2) for any calendar year, the rates of tax in effect under section 2502(a)(2) for such calendar year shall, in lieu of the rates of tax in effect for preceding calendar periods, be used in determining the amounts allowable as a credit under this section for all preceding calendar periods.

(b) Adjustment to credit for certain gifts made before 1977.--The amount allowable under subsection (a) shall be reduced by an amount equal to 20 percent of the aggregate amount allowed as a specific exemption under section 2521 (as in effect before its repeal by the Tax Reform Act of 1976) with respect to gifts made by the individual after September 8, 1976.

(c) Limitation based on amount of tax.--The amount of the credit allowed under subsection (a) for any calendar year shall not exceed the amount of the tax imposed by section 2501 for such calendar year.

CREDIT(S)

(Added Pub.L. 94-455, Title XX, § 2001(b)(2), Oct. 4, 1976, 90 Stat. 1849; amended Pub.L. 97-34, Title IV, §§ 401(b), 442(a)(5), Aug. 13, 1981, 95 Stat. 299, 321; Pub.L. 101-508, Title XI, § 11801(a)(40), (c)(19)(B), Nov. 5, 1990, 104 Stat. 1388-521, 1388-528; Pub.L. 105-34, Title V, § 501(a)(2), Aug. 5, 1997, 111 Stat. 845; Pub.L. 107-16, Title V, § 521(b)(2), June 7, 2001, 115 Stat. 71; Pub.L. 111-312, Title III, §§ 301(b), 302(b)(1)(A),

I.R.C. § 2631

Effective: December 17, 2010

United States Code Annotated Currentness
Title 26. Internal Revenue Code (Refs & Annos)
Subtitle B. Estate and Gift Taxes (Refs & Annos)
Chapter 13. Tax on Generation-Skipping Transfers (Refs & Annos)
Subchapter D. Gst Exemption
→→ § 2631. GST exemption

(a) General rule.--For purposes of determining the inclusion ratio, every individual shall be allowed a GST exemption amount which may be allocated by such individual (or his executor) to any property with respect to which such individual is the transferor.

(b) Allocations irrevocable.--Any allocation under subsection (a), once made, shall be irrevocable.

(c) GST exemption amount.--For purposes of subsection (a), the GST exemption amount for any calendar year shall be equal to the basic exclusion amount under section 2010(c) for such calendar year.

CREDIT(S)

(Added Pub.L. 99-514, Title XIV, § 1431(a), Oct. 22, 1986, 100 Stat. 2721; amended Pub.L. 105-34, Title V, § 501(d), Aug. 5, 1997, 111 Stat. 846; Pub.L. 105-206, Title VI, § 6007(a)(1), July 22, 1998, 112 Stat. 806; Pub.L. 107-16, Title V, § 521(c), June 7, 2001, 115 Stat. 72; Pub.L. 111-312, Title III, § 303(b)(2), Dec. 17, 2010, 124 Stat. 3303.)

TERMINATION OF AMENDMENT

<Pub.L. 107-16, § 901 shall apply to amendments made by Pub.L. 111-312, Title III, § 301 et seq., see Pub.L. 111-312, § 304, set out as a Sunset Provisions note under 26 U.S.C.A. § 121.>

<For termination of amendments by Pub.L. 107-16, § 901, see Sunset Provisions note set out under this section.>

HISTORICAL AND STATUTORY NOTES

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@irscounsel.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).

Instructions for Form 706

(Rev. August 2011)

Department of the Treasury
Internal Revenue Service

For decedents dying after December 31, 2010, and before January 1, 2012

United States Estate (and Generation-Skipping Transfer) Tax Return

Section references are to the Internal Revenue Code unless otherwise noted.

Prior Revisions of Form 706

For Decedents Dying and After	Before	Use Revision of Form 706 Dated
December 31, 1998	January 1, 2001	July 1999
December 31, 2000	January 1, 2002	November 2001
December 31, 2001	January 1, 2003	August 2002
December 31, 2002	January 1, 2004	August 2003
December 31, 2003	January 1, 2005	August 2004
December 31, 2004	January 1, 2006	August 2005
December 31, 2005	January 1, 2007	October 2006
December 31, 2006	January 1, 2008	September 2007
December 31, 2007	January 1, 2009	August 2008
December 31, 2008	January 1, 2010	September 2009
December 31, 2009	January 1, 2011	July 2011

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What's New

- Use this revision of Form 706 only for the estates of decedents who died in calendar year 2011.
- The Tax Relief, Unemployment Insurance Reauthorization and Job Creation Act of 2010 (Act) included several provisions affecting the 2011 Form 706. They are:

  a. Estates, generation-skipping transfers (GST), and lifetime gifts all have a maximum tax rate of 35%.

  b. The credit for transfers made by gift is reunified with the credit for transfers made at death. Both will receive a combined unified credit of $1,730,800 (basic exclusion amount of $5,000,000) under section 2010.

  c. The applicable exclusion amount now may consist of a basic exclusion amount of $5,000,000 and, in the case of a surviving spouse, the unused exclusion amount of a predeceased spouse (who died after December 31, 2010). A timely and complete Form 706 filed for the predeceased spouse's estate is required, even if there is no tax due, to allow the surviving spouse to use the last predeceased spouse's unused exclusion amount. See instructions for *Part 2—Tax Computation*, line 9 and *Part 4—General Information*, line 3 and line 4.

  d. If the estate chooses not to allow the surviving spouse to take into account, for estate and gift tax purposes, the decedent's unused exclusion amount, then do one of the following: attach a statement to the Form 706 indicating that the estate is not making the election under section 2010(c)(5) or enter "No Election Under Section 2010(c)(5)" across the top of the first page of Form 706.

  e. Prior gifts must be calculated at the rate in effect at the decedent's date of death. See *Worksheet TG—Taxable Gifts Reconciliation, Line 4 Worksheet*, and *Line 7 Worksheet* (Unified Credit Allowable for Prior Periods), below.

- Various dollar amounts and limitations in the Form 706 are indexed for inflation. For decedents dying in 2011, the following amounts are applicable:

  a. The ceiling on special-use valuation is $1,020,000.

  b. The amount used in figuring the 2% portion of estate tax payable in installments is $1,360,000.