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Reg. Section 20.2010-2(a)(5)

Portability provisions applicable to estate of a decedent survived by a spouse

(a) Election required for portability. To allow a decedent's surviving spouse to take into account that decedent's deceased spousal unused exclusion (DSUE) amount, the executor of the decedent's estate must elect portability of the DSUE amount on a timely filed Form 706, "United States Estate (and Generation-Skipping Transfer) Tax Return" (estate tax return). This election is referred to in this section and in § 20.2010-3 as the portability election.

(1) Timely filing required. An estate that elects portability will be considered, for purposes of subtitle B and subtitle F of the Internal Revenue Code (Code), to be required to file a return under section 6018(a). Accordingly, the due date of an estate tax return required to elect portability is nine 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). See §§ 20.6075-1 and 20.6081-1 for additional rules relating to the time for filing estate tax returns. An extension of time to elect portability under this paragraph (a) will not be granted under §301.9100-3 of this chapter to an estate that is required to file an estate tax return under section 6018(a), as determined without regard to this paragraph (a). Such an extension, however, may be available under the procedures applicable under §§301.9100-1 and 301.9100-3 of this chapter to an estate that is not required to file a return under section 6018(a), as determined without regard to this paragraph (a).

(2) Portability election upon filing of estate tax return. 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 requirement in paragraph (a)(3)(i) of this section. See paragraph (a)(7) of this section for the return requirements related to the portability election.

(3) Portability election not made; requirements for election not to apply. The executor of the estate of a decedent survived by a spouse will not make or be considered to make the portability election if either of the following applies:

(i) The executor states affirmatively on a timely filed estate tax return, or in an attachment to that estate tax return, that the estate is not electing portability under section 2010(c)(5). The manner in which the executor may make this affirmative statement on the estate tax return is as set forth in the instructions issued with respect to such form ("Instructions for Form 706").

(ii) The executor does not timely file an estate tax return in accordance with paragraph (a)(1) of this section.

(4) Election irrevocable. An executor of the estate of a decedent survived by a spouse who timely files an estate tax return may make or may supersede a portability election

previously made, provided that the estate tax return reporting the election or the superseding election is filed on or before the due date of the return, including extensions actually granted. However, see paragraph (a)(6) of this section when contrary elections are made by more than one person permitted to make the election. The portability election, once made, becomes irrevocable once the due date of the estate tax return, including extensions actually granted, has passed.



(5) Estates eligible to make the election. An executor may elect portability on behalf of the estate of a decedent survived by a spouse if the decedent dies on or after January 1, 2011. However, an executor of the estate of a nonresident decedent who was not a citizen of the United States at the time of death may not elect portability on behalf of that decedent, and the timely filing of such a decedent's estate tax return will not constitute the making of a portability election.

(6) Persons permitted to make the election.

(i) Appointed executor. An executor or administrator of the estate of a decedent survived by a spouse that is appointed, qualified, and acting within the United States, within the meaning of section 2203 (an appointed executor), may timely file the estate tax return on behalf of the estate of the decedent and, in so doing, elect portability of the decedent's DSUE amount. An appointed executor also may elect not to have portability apply pursuant to paragraph (a)(3) of this section.

(ii) Non-appointed executor. If there is no appointed executor, any person in actual or constructive possession of any property of the decedent (a non-appointed executor) may timely file the estate tax return on behalf of the estate of the decedent and, in so doing, elect portability of the decedent's DSUE amount, or, by complying with paragraph (a)(3) of this section, may elect not to have portability apply. A portability election made by a non-appointed executor when there is no appointed executor for that decedent's estate can be superseded by a subsequent contrary election made by an appointed executor of that same decedent's estate on an estate tax return filed on or before the due date of the return, including extensions actually granted. An election to allow portability made by a non-appointed executor cannot be superseded by a contrary election to have portability not apply made by another non-appointed executor of that same decedent's estate (unless such other non-appointed executor is the successor of the non-appointed executor who made the election). See §20.6018-2 for additional rules relating to persons permitted to file the estate tax return.

(7) Requirements of return.

(i) General rule. An estate tax return will be considered complete and properly prepared for purposes of this section if it is prepared in accordance with the instructions issued for the estate tax return (Instructions for Form 706) and if the requirements of §§20.6018-2, 20.6018-3, and 20.6018-4 are satisfied. However, see paragraph (a)(7)(ii) of this section for reduced requirements applicable to certain property of certain estates.

(ii) Reporting of value not required for certain property.

(A) In general. A special rule applies with respect to certain property of estates in which the executor is not required to file an estate tax return

under section 6018(a), as determined without regard to paragraph (a)(1) of this section. With respect to such an estate, for bequests, devises, or transfers of property included in the gross estate, the value of which is deductible under section 2056 or 2056A (marital deduction property) or under section 2055(a) (charitable deduction property), an executor is not required to report a value for such property on the estate tax return (except to the extent provided in this paragraph (a)(7)(ii)(A)) and will be required to report only the description, ownership, and/or beneficiary of such property, along with all other information necessary to establish the right of the estate to the deduction in accordance with §§20.2056(a)-1(b)(i) through (iii) and 20.2055-1(c), as applicable. However, this rule does not apply in certain circumstances as provided in this paragraph (a) and as may be further described in guidance issued from time to time by publication in the Internal Revenue Bulletin (see § 601.601(d)(2)(ii)(b) of this chapter). In particular, this rule does not apply to marital deduction property or charitable deduction property if-

(1) The value of such property relates to, affects, or is needed to determine, the value passing from the decedent to a recipient other than the recipient of the marital or charitable deduction property;

(2) The value of such property is needed to determine the estate's eligibility for the provisions of sections 2032, 2032A, or another estate or generation-skipping transfer tax provision of the Code for which the value of such property or the value of the gross estate or adjusted gross estate must be known (not including section 1014 of the Code);

(3) Less than the entire value of an interest in property includible in the decedent's gross estate is marital deduction property or charitable deduction property; or

(4) A partial disclaimer or partial qualified terminable interest property (QTIP) election is made with respect to a bequest, devise, or transfer of property includible in the gross estate, part of which is marital deduction property or charitable deduction property.

(B) Return requirements when reporting of value not required for certain property. Paragraph (a)(7)(ii)(A) of this section applies only if the executor exercises due diligence to estimate the fair market value of the gross estate, including the property described in paragraph (a)(7)(ii)(A) of this section. Using the executor's best estimate of the value of properties to which paragraph (a)(7)(ii)(A) of this section applies, the executor must report on the estate tax return, under penalties of perjury, the amount corresponding to the particular range within which falls the executor's best estimate of the total gross estate, in accordance with the Instructions for Form 706.

(C) Examples. The following examples illustrate the application of paragraph (a)(7)(ii) of this section. In each example, assume that Husband

(H) dies in 2015, survived by his wife (W), that both H and W are U.S. citizens, that H's gross estate does not exceed the excess of the applicable exclusion amount for the year of his death over the total amount of H's adjusted taxable gifts and any specific exemption under section 2521, and that H's executor (E) timely files Form 706 solely to make the portability election.

Example (1).

(i) Facts. The assets includible in H's gross estate consist of a parcel of real property and bank accounts held jointly with W with rights of survivorship, a life insurance policy payable to W, and a survivor annuity payable to W for her life. H made no taxable gifts during his lifetime.

(ii) Application. E files an estate tax return on which these assets are identified on the proper schedule, but E provides no information on the return with regard to the date of death value of these assets in accordance with paragraph (a)(7)(ii)(A) of this section. To establish the estate's entitlement to the marital deduction in accordance with §20.2056(a)-1(b) (except with regard to establishing the value of the property) and the instructions for the estate tax return, E includes with the estate tax return evidence to verify the title of each jointly held asset, to confirm that W is the sole beneficiary of both the life insurance policy and the survivor annuity, and to verify that the annuity is exclusively for W's life. Finally, E reports on the estate return E's best estimate, determined by exercising due diligence, of the fair market value of the gross estate in accordance with paragraph (a)(7)(ii)(B) of this section. The estate tax return is considered complete and properly prepared and E has elected portability.

Example (2).

(i) Facts. H's will, duly admitted to probate and not subject to any proceeding to challenge its validity, provides that H's entire estate is to be distributed outright to W. The non-probate assets includible in H's gross estate consist of a life insurance policy payable to H's children from a prior marriage, and H's individual retirement account (IRA) payable to W. H made no taxable gifts during his lifetime.

(ii) Application. E files an estate tax return on which all of the assets includible in the gross estate are identified on the proper schedule. In the case of the probate assets and the IRA, no information is provided with regard to date of death value in accordance with paragraph (a)(7)(ii)(A) of this section. However, E attaches a copy of H's will and describes each such asset and its ownership to establish the estate's entitlement to the marital deduction in accordance with the instructions for the estate tax return and §20.2056(a)-1(b) (except with regard to establishing the value of the property). In the case of the life insurance policy payable to H's children, all of the regular return requirements, including reporting and establishing the fair market value of such asset, apply. Finally, E reports on the estate return E's best estimate, determined by exercising due diligence, of the fair market value of the gross estate in accordance with paragraph (a)(7)(ii)(B) of this section. The estate tax return is considered complete and properly prepared and E has elected portability.

Example (3).

(i) Facts. H's will, duly admitted to probate and not subject to any proceeding to challenge its validity, provides that 50 percent of the property passing under the terms of H's will is to be paid to a marital trust for W and 50 percent is to be paid to a trust for W and their descendants.

(ii) Application. The amount passing to the non-marital trust cannot be verified without knowledge of the full value of the property passing under the will. Therefore, the value of the property of the marital trust relates to or affects the value passing to the trust for W and the descendants of H and W. Accordingly, the general return requirements apply to all of the property includible in the gross estate and the provisions of paragraph (a)(7)(ii) of this section do not apply.

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