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Reg. Section 20.2010-3

Portability provisions applicable to the surviving spouse's estate

(a) Surviving spouse's estate limited to DSUE amount of last deceased spouse.

(1) In general. The deceased spousal unused exclusion (DSUE) amount of a decedent, computed under §20.2010-2(c), is included in determining the surviving spouse's applicable exclusion amount under section 2010(c)(2), provided-

- (i) Such decedent is the last deceased spouse of such surviving spouse within the meaning of §20.2010-1(e)(5) on the date of the death of the surviving spouse; and
- (ii) The executor of the decedent's estate elected portability (see §20.2010-2(a) and (b) for applicable requirements).

(2) No DSUE amount available from last deceased spouse. If the last deceased spouse of such surviving spouse had no DSUE amount, or if the executor of such a decedent's estate did not make a portability election, the surviving spouse's estate has no DSUE amount (except as provided in paragraph (b)(1)(ii) of this section) to be included in determining the applicable exclusion amount, even if the surviving spouse previously had a DSUE amount available from another decedent who, prior to the death of the last deceased spouse, was the last deceased spouse of such surviving spouse. See paragraph (b) of this section for a special rule in the case of multiple deceased spouses and a previously applied DSUE amount.

(3) Identity of last deceased spouse unchanged by subsequent marriage or divorce. A decedent is the last deceased spouse (as defined in §20.2010-1(e)(5)) of a surviving spouse even if, on the date of the death of the surviving spouse, the surviving spouse is married to another (then-living) individual. If a surviving spouse marries again and that marriage ends in divorce or an annulment, the subsequent death of the divorced spouse does not end the status of the prior deceased spouse as the last deceased spouse of the surviving spouse. The divorced spouse, not being married to the surviving spouse at death, is not the last deceased spouse as that term is defined in §20.2010-1(e)(5).

(b) Special rule in case of multiple deceased spouses and previously-applied DSUE amount.

(1) In general. A special rule applies to compute the DSUE amount included in the applicable exclusion amount of a surviving spouse who previously has applied the DSUE amount of one or more deceased spouses to taxable gifts in accordance with §25.2505-2(b) and (c). If a surviving spouse has applied the DSUE amount of one or more (successive) last deceased spouses to the surviving spouse's transfers during life, and if any of those last deceased spouses is different from the surviving spouse's last deceased spouse as defined in §20.2010-1(e)(5) at the time of the surviving spouse's death, then the DSUE amount to be included in determining the applicable exclusion amount of the surviving spouse at the time of the surviving spouse's death is the sum of-

(i) The DSUE amount of the surviving spouse's last deceased spouse as described in paragraph (a)(1) of this section; and

(ii) The DSUE amount of each other deceased spouse of the surviving spouse, to the extent that such amount was applied to one or more taxable gifts of the surviving spouse.

(2) Example. The following example, in which all described individuals are U.S. citizens, illustrates the application of this paragraph (b):

Example.

(i) Facts. Husband 1 (H1) dies in 2011, survived by Wife (W). Neither has made any taxable gifts during H1's lifetime. H1's executor elects portability of H1's DSUE amount. The DSUE amount of H1 as computed on the estate tax return filed on behalf of H1's estate is \$5,000,000. In 2012, W makes taxable gifts to her children valued at \$2,000,000. W reports the gifts on a timely filed gift tax return. W is considered to have applied \$2,000,000 of H1's DSUE amount to the amount of taxable gifts, in accordance with § 25.2505-2(c), and, therefore, W owes no gift tax. W has an applicable exclusion amount remaining in the amount of \$8,120,000 (\$3,000,000 of H1's remaining DSUE amount plus W's own \$5,120,000 basic exclusion amount). W marries Husband 2 (H2) in 2013. H2 dies in 2014. H2's executor elects portability of H2's DSUE amount, which is properly computed on H2's estate tax return to be \$2,000,000. W dies in 2015.

(ii) Application. The DSUE amount to be included in determining the applicable exclusion amount available to W's estate is \$4,000,000, determined by adding the \$2,000,000 DSUE amount of H2 and the \$2,000,000 DSUE amount of H1 that was applied by W to W's 2012 taxable gifts. The \$4,000,000 DSUE amount added to W's \$5,430,000 basic exclusion amount (for 2015), causes W's applicable exclusion amount to be \$9,430,000.

(c) Date DSUE amount taken into consideration by surviving spouse's estate.

(1) General rule. A portability election made by an executor of a decedent's estate (see §20.2010-2(a) and (b) for applicable requirements) generally applies as of the date of the decedent's death. Thus, such decedent's DSUE amount is included in the applicable exclusion amount of the decedent's surviving spouse under section 2010(c)(2) and will be applicable to transfers made by the surviving spouse after the decedent's death (subject to the limitations in paragraph (a) of this section). However, such decedent's DSUE amount will not be included in the applicable exclusion amount of the surviving spouse, even if the surviving spouse had made a transfer in reliance on the availability or computation of the decedent's DSUE amount:

(i) If the executor of the decedent's estate supersedes the portability election by filing a subsequent estate tax return in accordance with §20.2010-2(a)(4);

(ii) To the extent that the DSUE amount subsequently is reduced by a valuation adjustment or the correction of an error in calculation; or

(iii) To the extent that the surviving spouse cannot substantiate the DSUE amount claimed on the surviving spouse's return.

(2) Exception when surviving spouse not a U.S. citizen on date of deceased spouse's death. If a surviving spouse becomes a citizen of the United States after the death of the surviving spouse's last deceased spouse, the DSUE amount of the surviving spouse's last deceased spouse becomes available to the surviving spouse on the date the surviving spouse becomes a citizen of the United States (subject to the limitations in paragraph (a) of this section). However, when the special rule regarding qualified domestic trusts in paragraph (c)(3) of this section applies, the earliest date on which a decedent's DSUE amount may be included in the applicable exclusion amount of such decedent's surviving spouse who becomes a U.S. citizen is as provided in paragraph (c)(3) of this section.

(3) Special rule when property passes to surviving spouse in a qualified domestic trust.

(i) In general. When property passes from a decedent for the benefit of the decedent's surviving spouse in one or more qualified domestic trusts (QDOT) as defined in section 2056A(a) and the decedent's executor elects portability, the DSUE amount available to be included in the applicable exclusion amount of the surviving spouse under section 2010(c)(2) is the DSUE amount of the decedent as redetermined in accordance with §20.2010-2(c)(4) (subject to the limitations in paragraph (a) of this section). The earliest date on which such decedent's DSUE amount may be included in the applicable exclusion amount of the surviving spouse under section 2010(c)(2) is the date of the occurrence of the final QDOT distribution or final other event (generally, the termination of all QDOTs created by or funded with assets passing from the decedent or the death of the surviving spouse) on which tax under section 2056A is imposed. However, the decedent's DSUE amount as redetermined in accordance with § 20.2010-2(c)(4) may be applied to certain taxable gifts of the surviving spouse. See §25.2505-2(d)(3)(i).

(ii) Surviving spouse becomes a U.S. citizen. If a surviving spouse for whom property has passed from a decedent in one or more QDOTs becomes a citizen of the United States and the requirements in section 2056A(b)(12) and the corresponding regulations are satisfied, then the date on which such decedent's DSUE amount may be included in the applicable exclusion amount of the surviving spouse under section 2010(c)(2) (subject the limitations in paragraph (a) of this section) is the date on which the surviving spouse becomes a citizen of the United States. See §20.2010-2(c)(4) for the rules for computing the decedent's DSUE amount in the case of a qualified domestic trust.

(d) Authority to examine returns of deceased spouses. For the purpose of determining the DSUE amount to be included in the applicable exclusion amount of a surviving spouse, the Internal Revenue Service (IRS) may examine returns of each of the surviving spouse's deceased spouses whose DSUE amount is claimed to be included in the surviving spouse's applicable exclusion amount, regardless of whether the period of limitations on assessment has expired for any such return. The IRS's authority to examine returns of a deceased spouse applies with respect to each transfer by the surviving spouse to which a DSUE amount is or has been applied. Upon examination, the IRS may adjust or eliminate the DSUE amount reported on such a return of a deceased spouse; however, the IRS may assess additional tax on that return only if that tax is assessed within the period of limitations on assessment under section 6501 applicable to the tax shown on that return. See also section 7602 for the IRS's authority, when ascertaining the correctness of any return, to examine any returns that may be relevant or material to such inquiry. For purposes of these examinations to determine the DSUE amount, the surviving

spouse is considered to have a material interest that is affected by the return information of the deceased spouse within the meaning of section 6103(e)(3).

(e)Availability of DSUE amount for estates of nonresidents who are not citizens. The estate of a nonresident surviving spouse who is not a citizen of the United States at the time of such surviving spouse's death shall not take into account the DSUE amount of any deceased spouse of such surviving spouse within the meaning of §20.2010-1(e)(5) except to the extent allowed under any applicable treaty obligation of the United States. See section 2102(b)(3).

(f)Effective/applicability date. This section applies to the estates of decedents dying on or after June 12, 2015. See 26 CFR 20.2010-3T, as contained in 26 CFR part 20, revised as of April 1, 2015, for the rules applicable to estates of decedents dying on or after January 1, 2011, and before June 12, 2015.