

Spouse, as the executrix of Decedent's estate, represents that the value of Decedent's gross estate is less than the basic exclusion amount in the year of the Decedent's death and that during his lifetime, Decedent made no taxable gifts. As executrix, Spouse requests an extension of time pursuant to § 301.9100-3 to elect portability of Decedent's DSUE amount pursuant to § 2010(c)(5)(A).

LAW AND ANALYSIS:

Section 2001(a) imposes a tax on the transfer of the taxable estate of every decedent who is a citizen or resident of the United States.

Section 2010(a) provides that a credit of the applicable credit amount shall be allowed to the estate of every decedent against the tax imposed by § 2001.

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

On December 17, 2010, Congress amended § 2010(c), effective for estates of decedents dying and gifts made after December 31, 2010, to allow portability of a decedent's unused applicable exclusion amount between spouses. Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. No. 111-312, § 303, 124 Stat. 3296, 3302 (2010).

Section 2010(c)(2) provides that the applicable exclusion amount is the sum of the basic exclusion amount, and, in the case of a surviving spouse, the DSUE amount.

Section 2010(c)(3) generally provides that the basic exclusion amount is \$5,000,000, to be adjusted for inflation annually after calendar year 2011.

Section 2010(c)(4) defines the DSUE amount to mean the lesser of (A) the basic exclusion amount, or (B) the excess of—(i) the applicable exclusion amount of the last deceased spouse of the surviving spouse, over (ii) the amount with respect to which the tentative tax is determined under § 2001(b)(1) on the estate of such deceased spouse.

Section 2010(c)(5)(A) provides that a DSUE amount may not be taken into account by a surviving spouse under § 2010(c)(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. The election, once made, shall be irrevocable. No election may be made if such return is filed after the time prescribed by law (including extensions) for filing such return.

Section 2010(c)(6) provides that the Secretary shall prescribe regulations as may be necessary or appropriate to implement § 2010(c).

Section 6075(a) prescribes that returns made under § 6018(a) (relating to estate taxes) shall be filed within 9 months after the date of the decedent's death.

Section 6018(a)(1) provides that in all cases where the gross estate at the death of a citizen or resident exceeds the basic exclusion amount in effect under § 2010(c) for the calendar year which includes the date of death, the executor shall make a return with respect to the estate tax imposed by subtitle B of the Code.

Section 6018(a)(3) provides, in part, that the basic exclusion amount referred to in § 6018(a)(1) shall be reduced (but not below zero) by the sum of—(A) the amount of the adjusted taxable gifts (within the meaning of § 2001(b)) made by the decedent after December 31, 1976, plus, (B) the aggregate amount allowed as a specific exemption under § 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.

Section 20.2010-2T(a) of the Estate Tax Regulations provides that to allow a decedent's surviving spouse to take into account that decedent's DSUE amount, the executor of the decedent's estate must elect portability of the DSUE amount on a timely-filed Form 706.

Section 20.2010-2T(a)(1) provides that an estate that elects portability will be considered, for purposes of Subtitle B and Subtitle F of the Code to be required to file a return under § 6018(a). Accordingly, the due date of an estate tax return required to elect portability is 9 months after the decedent's date of death or the last day of the period covered by an extension (if an extension of time for filing has been obtained).

Section 20.2010-2T(a)(2) provides that upon the timely filing of a complete and properly-prepared estate tax return, an executor of an estate of a decedent (survived by a spouse) will have elected portability of the decedent's DSUE amount unless the executor chooses not to elect portability and satisfies the requirements for the election not to apply in § 20.2010-2T(a)(3)(i).

Section 301.9100-1(c) provides that the Commissioner may grant a reasonable extension of time under the rules set forth in §§ 301.9100-2 and 301.9100-3 to make a regulatory election, or a statutory election (but no more than six months except in the case of taxpayer who is abroad), under all subtitles of the Code, except subtitles E, G, H, and I.

Section 301.9100-1(b) provides that the term "statutory election" means an election whose due date is prescribed by statute. The term "regulatory election" means an election whose due date is prescribed by a regulation published in the Federal

Register, or a revenue ruling, revenue procedure, notice, or announcement published in the Internal Revenue Bulletin.

Sections 301.9100-2 and 301.9100-3 provide the standards the Commissioner will use to determine whether to grant an extension of time to make an election. Section 301.9100-2 provides automatic extensions of time for making certain statutory and regulatory elections. Section 301.9100-3 provides for an extension of time for making regulatory elections that do not meet the requirements for an automatic extension of time under § 301.9100-2.

A request for relief under § 301.9100-3 will be granted when the taxpayer provides evidence to establish to the satisfaction of the Commissioner that the taxpayer acted reasonably and in good faith, and that granting relief will not prejudice the interests of the government.

Section 301.9100-3(b)(1)(v) provides that a taxpayer is deemed to have acted reasonably and in good faith if the taxpayer reasonably relied on a qualified tax professional, including a tax professional employed by the taxpayer and the tax professional failed to make, or advise the taxpayer to make, the election.

Sections 2010(c)(5)(A), 6075(a), and 6018(a), when construed jointly, prescribe a due date for electing portability for those estates required to file an estate tax return under § 6018. Accordingly, with respect to those estates, the portability election is a statutory election as defined in § 301.9100-1(b). However, when an executor is not required to file an estate tax return under § 6018, the Code does not specify a due date for an estate tax return filed for the purpose of making a portability election. Rather, the regulations under § 20.2010-2T(a), which are applicable to all estates electing portability, specify that the portability election must be made on a timely-filed Form 706. Accordingly, with respect to estates not required to file an estate tax return under § 6018, the portability election is a regulatory election as defined in § 301.9100-1(b).

As executrix, Spouse represents that, based on the value of the gross estate and taking into account any taxable gifts, Decedent's estate is not required to file an estate tax return under § 6018(a). Under these facts, the Commissioner has discretionary authority under § 301.9100-3 to grant to Decedent's estate an extension of time to elect portability.

Based on the facts submitted and the representations made, we conclude that the requirements of § 301.9100-3 have been satisfied. Accordingly, an extension of time of 120 days from the date of this letter is granted in which to elect portability under § 2010(c)(5). The election should be made by filing a complete and properly-prepared Form 706 and a copy of this letter, within 120 days from the date of this letter, to the Cincinnati Service Center, at the following address: Internal Revenue Service, Cincinnati Service Center, Stop 82, Cincinnati, OH 45999. For purposes of electing

portability, a Form 706 filed by Decedent's estate within 120 days from the date of this letter will be considered to be timely filed.

The rulings contained in this letter are based upon information and representations submitted by the taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. While this office has not verified any of the material submitted in support of the request for rulings, it is subject to verification on examination.

If it is later determined that, based on the value of the gross estate and taking into account any taxable gifts, Decedent's estate is required to file an estate tax return pursuant to § 6018(a), the Commissioner is without authority under § 301.9100-3 to grant to Decedent's estate an extension of time to elect portability and the grant of the extension referred to in this letter is deemed null and void.

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter.

This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to your authorized representative.

Sincerely,

James F. Hogan
Chief, Branch 4
Office of the Associate Chief Counsel
(Passthroughs & Special Industries)

Enclosures (2)

cc: