

Part III

Administrative, Procedural, and Miscellaneous

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

Rev. Proc. 2022-32

SECTION 1. PURPOSE

This revenue procedure supersedes Rev. Proc. 2017-34, 2017-26 I.R.B. 1282, and provides a simplified method for certain taxpayers to obtain an extension of time under § 301.9100-3 of the Procedure and Administration Regulations to make a “portability” election under § 2010(c)(5)(A) of the Internal Revenue Code (Code). For purposes of the Federal estate and gift taxes, a portability election allows a decedent’s unused exclusion amount (deceased spousal unused exclusion amount, or DSUE amount) to become available for application to the surviving spouse’s subsequent transfers during life or at death. The simplified method provided in this revenue procedure is to be used in lieu of the letter ruling process. No user fee is required for submissions filed under this revenue procedure.

SECTION 2. BACKGROUND

.01 Section 303(a) of the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 (TRUIRJCA), Pub. L. No. 111-312, 124 Stat. 3296, 3302 (2010), amended § 2010(c) of the Code to allow the estate of a decedent who is survived by a spouse to make a portability election. For purposes of the Federal estate and gift taxes, a portability election allows the surviving spouse to apply the decedent's DSUE amount to the surviving spouse's own transfers during life and at death. The portability election applies to estates of decedents dying after December 31, 2010, if such decedent is survived by a spouse. The portability provisions under § 2010(c) of the Code were scheduled to expire on January 1, 2013, pursuant to §§ 101(a)(1) and 304 of TRUIRJCA. However, § 101(a) of the American Taxpayer Relief Act of 2012, Pub. L. No. 112-240, 126 Stat. 2313 (2013), made the ability to elect portability permanent.

.02 Section 2010(c)(5)(A) provides certain requirements that the estate of a deceased spouse must satisfy to elect portability, including that the estate must elect portability of the DSUE amount on an estate tax return that is filed within the time prescribed by law (including extensions) for filing such return.

.03 For estates that are not required to file an estate tax return under § 6018(a) of the Code (as determined based on the value of the gross estate and adjusted taxable gifts), § 20.2010-2(a)(1) of the Estate Tax Regulations clarifies that 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). Section 20.2010-2(a)(1) further provides that an extension of

time under § 301.9100-3 to elect portability may be available to an estate that is not required to file an estate tax return under § 6018(a).

.04 On June 26, 2017, the Department of the Treasury (Treasury Department) and the Internal Revenue Service (IRS) published Rev. Proc. 2017-34, which provides a method for obtaining an extension of time under § 301.9100-3 to make a portability election under § 2010(c)(5)(A) that is available to the estates of decedents dying after December 31, 2010, if that estate was not required by § 6018(a) to file an estate tax return and if such a decedent was survived by a spouse. Under Rev. Proc. 2017-34, this method is a simplified method that is to be used in lieu of the letter ruling process and is available for a period extending to the second anniversary of the decedent's date of death.

.05 Since the publication of Rev. Proc. 2017-34, the IRS has continued to issue numerous letter rulings under § 301.9100-3 granting an extension of time to elect portability under § 2010(c)(5)(A) in situations in which the decedent's estate was not required by § 6018(a) to file an estate tax return and the time for obtaining relief under the simplified method had expired. The IRS has observed that a significant percentage of these ruling requests have been from estates of decedents who died within five years preceding the date of the request. The number of these requests continues to place a significant burden on the available resources of the IRS. The Treasury Department and the IRS have determined that the considerable number of ruling requests for an extension of time to elect portability received since the publication of Rev. Proc. 2017-34 indicates a need for continuing relief for the estates of decedents having no filing requirement under § 6018(a). Accordingly, this revenue procedure supersedes Rev.

Proc. 2017-34 and updates the procedures set forth therein by extending the period within which the estate of a decedent may make the portability election under that simplified method to on or before the fifth anniversary of the decedent's date of death.

SECTION 3. SCOPE

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

(1) The decedent:

(a) was survived by a spouse;

(b) died after December 31, 2010; and

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

(2) The executor is not required to file an estate tax return under § 6018(a) as determined based on the value of the gross estate and adjusted taxable gifts and without regard to the need to file for portability purposes;

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

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

.02 Executors that Timely Filed an Estate Tax Return. The simplified method of this revenue procedure is not available to the estate of a decedent whose executor filed an estate tax return within the time prescribed by § 20.2010-2(a)(1). Such an executor either will have elected portability of the DSUE amount by timely filing that estate tax

return or will have affirmatively opted out of portability in accordance with § 20.2010-2(a)(3)(i).

.03 Estates with a § 6018 Filing Requirement. As set forth in § 20.2010-2(a)(1), an extension of time to elect portability under § 301.9100-3, including through the simplified method of this revenue procedure, is not available to an estate that is required to file an estate tax return under § 6018(a) (as determined based on the value of the gross estate and adjusted taxable gifts) because, in that case, the due date of the election is prescribed by statute and not by regulation.

.04 Failure to Qualify for Relief under this Revenue Procedure. The executor of an estate not within the scope described in section 3.01 of this revenue procedure only because the executor does not satisfy the requirements of section 4.01 of this revenue procedure may request an extension of time to make the portability election under § 2010(c)(5)(A) by requesting a letter ruling under the provisions of § 301.9100-3. The requirements for requesting a letter ruling are described in Rev. Proc. 2022-1 (or any successor revenue procedure).

SECTION 4. RELIEF FOR CERTAIN LATE PORTABILITY ELECTIONS

.01 Requirements for Relief. The requirements for relief under this revenue procedure are as follows:

(1) A person permitted to make the election on behalf of the estate of a decedent--that is, an executor described in § 20.2010-2(a)(6)--must file a complete and properly prepared Form 706, United States Estate (and Generation-Skipping Transfer) Tax Return, on or before the fifth annual anniversary of the decedent's date of death. The

Form 706 will be considered complete and properly prepared if it is prepared in accordance with § 20.2010-2(a)(7).

(2) The executor filing the Form 706 on behalf of the decedent's estate must state at the top of the Form 706 that the return is "FILED PURSUANT TO REV. PROC. 2022-32 TO ELECT PORTABILITY UNDER § 2010(c)(5)(A)."

.02 Extent of Relief. Satisfaction of the requirements for relief provided in section 4.01 of this revenue procedure, by an executor for whom the relief is available pursuant to section 3.01 of this revenue procedure, is deemed to satisfy the requirements for relief under § 301.9100-3 and upon that satisfaction, relief is granted under the provisions of § 301.9100-3 to extend the time to elect portability under § 2010(c)(5)(A). Accordingly, for purposes of electing portability, the Form 706 of that decedent's estate will be considered to have been filed timely in accordance with § 20.2010-2(a)(1).

.03 Subsequent Determination that Executor Is Required to File a Return under § 6018(a). If, subsequent to the grant of relief pursuant to this revenue procedure, it is determined that, based on the value of the gross estate and taking into account any taxable gifts, the executor was required to file an estate tax return under § 6018(a), the grant of an extension as provided in section 4.02 of this revenue procedure is deemed null and void *ab initio*.

SECTION 5. IMPACT OF RELIEF ON SURVIVING SPOUSE

.01 Application of DSUE Amount. If the decedent's estate is granted relief under this revenue procedure so that the estate tax return is considered to have been timely filed for purposes of electing portability, the DSUE amount of that decedent is available to the decedent's surviving spouse or the estate of the surviving spouse for application

to the surviving spouse's transfers made on or after the decedent's date of death in accordance with the rules prescribed under § 20.2010-3 of the Estate Tax Regulations and § 25.2505-2 of the Gift Tax Regulations. However, if the increase in the surviving spouse's applicable exclusion amount attributable to the addition of the decedent's DSUE amount as of the decedent's date of death results in an overpayment of gift or estate tax by the surviving spouse or his or her estate, no claim for credit or refund may be made if the period of limitations under § 6511(a) of the Code for filing a claim for credit or refund of an overpayment of tax with respect to such transfer has expired. That is, an extension of time to elect portability granted under this revenue procedure does not extend the period during which the surviving spouse or the surviving spouse's estate may make a claim for credit or refund under § 6511(a).

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

.03 Examples.

(1) Example 1.

(a) Predeceasing Spouse (S1) dies on January 1, 2018, survived by Surviving Spouse (S2). The assets includible in S1's gross estate consist of cash on deposit in bank accounts held jointly with S2 with rights of survivorship in the amount of \$4,500,000. S1 made no taxable gifts during life. S1's executor is not required to file an estate tax return under § 6018(a) and does not file such a return.

(b) S2 dies on January 29, 2021. S2's taxable estate is \$17,000,000 and S2 made no taxable gifts during life. S2's executor files a Form 706 on behalf of S2's estate on October 29, 2021, claiming an applicable exclusion amount of \$11,700,000. S2's executor includes payment of the estate tax with the Form 706.

(c) Pursuant to this revenue procedure, S1's executor files a complete and properly prepared Form 706 on behalf of S1's estate on December 1, 2022, reporting a DSUE amount of \$11,180,000. The executor includes at the top of the Form 706 the statement required by section 4.01(2) of this revenue procedure. The filing of the return satisfies the requirements for a grant of relief under this revenue procedure and S1's estate is deemed to have made a valid portability election. The IRS accepts the return of S1's estate with no changes.

(d) To recover the estate tax paid, S2's executor must file a claim for credit or refund of tax by October 29, 2024 (the end of the period of limitations prescribed in § 6511(a)), even though a Form 706 to elect portability was not filed on behalf of S1's estate at the time S2's estate filed its Form 706. Such a claim filed on Form 843, Claim for Refund and Request for Abatement, in anticipation of the filing of the Form 706 by S1's executor will be considered a protective claim for credit or refund of tax. Accordingly, as long as the Form 843 is filed on or before October 29, 2024, the IRS

can consider and process that claim for credit or refund of tax once S1's estate is deemed to have made a valid portability election and S2's estate notifies the IRS that the claim for credit or refund is ready for consideration.

(2) Example 2.

(a) The facts relating to S1 and S1's estate are the same as in Example 1. S2 makes a gift to Child of \$13,000,000 on December 1, 2020. S2 has made no prior taxable gifts. On April 15, 2021, S2's executor files a Form 709, United States Gift (and Generation-Skipping Transfer) Tax Return, claiming an applicable exclusion amount of \$11,580,000. S2's executor tenders payment of the gift tax with the Form 709.

(b) To recover the gift tax paid, S2's executor must file a claim for credit or refund of tax (protective or otherwise) within the time prescribed in § 6511(a) for filing a claim for credit or refund; in this case, April 15, 2024.

(3) Example 3.

(a) The facts are the same as in Example 2 except that S2's Form 709 claims an applicable exclusion amount of \$22,760,000, including a DSUE amount of \$11,180,000 from S1's estate. As a result, the Form 709 reports no tax due and S2's executor tenders no gift tax.

(b) Although the portability election, once made, makes S1's DSUE amount available to S2 retroactively to S1's date of death, that DSUE amount is not available until the election is made. Because S2's executor files the Form 709 before S1's estate makes the portability election, the claimed application of the DSUE amount will be denied and gift tax on the transfer will be assessed. S2's executor pays the gift tax assessed. To recover that gift tax once the portability election has been made by S1's

estate, S2's executor must file a claim for credit or refund of tax (protective or otherwise) within the time prescribed in § 6511(a) for filing a claim for credit or refund.

SECTION 6. EFFECT ON OTHER DOCUMENTS

Rev. Proc. 2017-34, 2017-26 I.R.B. 1282, is superseded. Rev. Proc. 2022-3, 2022-1 I.R.B. 144, is amplified.

SECTION 7. EFFECTIVE DATE

.01 In General. This revenue procedure is effective July 8, 2022.

.02 Letter Rulings Will Not Be Issued. On or before the fifth anniversary of a decedent's date of death, the exclusive procedure for obtaining an extension of time under § 301.9100-3 to make a portability election under § 2010(c)(5)(A) for the estate of a decedent, if the decedent and executor meet the requirements of section 3.01(1) through (3) of this revenue procedure, is the procedure described in section 4.01 of this revenue procedure. If an executor of such an estate has filed a request for a letter ruling seeking an extension of time under § 301.9100-3 to make a portability election under § 2010(c)(5)(A) and that letter ruling is pending in the National Office on July 8, 2022, the Office of the Associate Chief Counsel (Passthroughs & Special Industries) will close its file on the ruling request and refund the user fee, and the estate may obtain the relief granted by this revenue procedure only by complying with section 4.01 of this revenue procedure.

SECTION 8. DRAFTING INFORMATION

The principal author of this revenue procedure is Juli Ro Kim of the Office of Associate Chief Counsel (Passthroughs & Special Industries). For further information

regarding this revenue procedure contact Ms. Kim at (202) 317-6859 (not a toll-free call).