

# THE I.R.S. EXTENDS THE TIME FOR ESTATE TAX PORTABILITY ELECTION FOR SMALL ESTATES

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## Tags

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On January 27, 2014, the I.R.S. released Rev. Proc. 2014-18. This revenue procedure provides an automatic extension of time to file a late portability election for estates of the first to die of a married couple provided that certain requirements are met. "Portability" refers to the option of the surviving spouse to make use of any gift and estate tax exemption that was not used by the deceased spouse. Thus, if the executor missed the opportunity to elect portability, now is the time to take advantage of this election, as this opportunity will end on December 31, 2014.

## BACKGROUND

In 2010, Congress amended §2010(c) of the Code to allow the estate of a decedent who is survived by a spouse to make a portability election, which allows the surviving spouse to apply the decedent's unused exclusion ("D.S.U.E.") amount toward the surviving spouse's own transfers during life and at death.<sup>19</sup>

Notice 2011-82, issued on October 17, 2011, provided preliminary guidance regarding the requirements to elect portability of the decedent's D.S.U.E. amount. Notice 2012-12, issued on March 3, 2012, provided temporary (and limited) relief by, in general, extending the deadline to file an estate tax return (Form 706, *Unified States Estate (and Generation-Skipping Transfer) Tax Return*) for portability election purposes by six months if certain requirements were met. In June 2012, temporary regulations were issued that provided more detailed guidance on portability.

In general, as noted above, the D.S.U.E. amount is the portion of the estate tax exemption amount which is unused and, more specifically, is calculated as follows: the D.S.U.E. amount is the lesser of (a) the basic exclusion amount in effect on the date of death of the person whose D.S.U.E. is being computed (e.g., \$5 million in 2011, \$5.12 million in 2012, \$5.25 million in 2013, as adjusted for inflation, respectively), or (b) the decedent's applicable exclusion amount less the amount of

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Estates of non-resident, non-citizens cannot take advantage of the portability provisions except as allowed under a treaty provision. See Treas. Regs. §20.2010-1T(d)(5).

the “taxable estate” plus the “adjusted taxable gifts.”<sup>20</sup> The taxable estate is the gross estate less exclusions and deductions (including the marital deduction for gifts left to the decedent’s spouse). Adjusted taxable gifts are generally the cumulative total of taxable gifts made after December 31, 1976.

**Example 1:** Assume that the decedent, a U.S. citizen, died in 2011. The exclusion amount is \$5 million. The decedent’s assets consist of a bank account holding investments in certificates of deposit. The account is valued at \$3 million at death. The decedent leaves his entire estate to his spouse, a U.S. citizen. The decedent made no taxable gifts during his lifetime. Under these facts, the decedent’s gross estate is \$3 million, the decedent’s taxable estate is \$0 (due the \$3 million marital deduction), and the decedent’s adjusted taxable gifts is \$0. Thus the D.S.U.E. amount is \$5 million, which can be ported over to the decedent’s spouse if certain requirements are met.

The tax law requires that in order to take advantage of this portability election, the executor must timely file Form 706, which must include a computation of the D.S.U.E. amount, even for estates that did not need to file a return because the gross value of the decedent’s assets plus the adjusted taxable gifts was less than the exemption amount. The due date to make this election 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). A late filing would mean that portability could not be used. If the taxpayer missed the opportunity to take advantage of this extension, special relief may, nonetheless, be available for the taxpayer under §9100.<sup>21</sup> Additionally, prior to Rev. Proc. 2014-18, the I.R.S. granted several lettering rules for an extension of time if certain requirements were met. However, a formal request and a user fee (\$10,000 in 2013) would be required simply to have the request considered.

**Example 2:** Assume the same facts as Example 1, but the executor did not elect, by timely filing Form 706, to port the D.S.U.E. amount. In this case the surviving spouse could not utilize the D.S.U.E. amount without §9100 relief, in which case a user fee would apply and the outcome would be uncertain.

Until recently, same sex spouses could not take advantage of tax law benefits given to married persons, including the portability provision, under the Defense of Marriage Act (“D.O.M.A.”). D.O.M.A. was struck down in *United States v. Windsor*, 570 U.S. \_\_\_, 133 S. Ct. 2675 (2013). Soon thereafter, the I.R.S. released Rev. Proc. 2013-17, which clarified that, for purposes of the Code and regulations, the

<sup>20</sup> Generally, taxable gifts made after December 31, 1976 in excess of the annual gift exclusion amount must be added back into the taxable estate to determine the tax base.

<sup>21</sup> Section 9100 relief is unavailable if the rule at issue is prescribed by statute. If, however, the estate tax return is not required to be filed but the executor is permitted to file in order to elect portability, the I.R.S. states that §9100 relief is available because the regulations (and not the statute) govern the time to file. See Rev. Proc. 2014-18.

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terms “husband and wife,” “husband,” and “wife” should be interpreted to include same-sex couples. Consequently, an executor of an estate of a deceased same sex married spouse may now amend the previously filed estate tax return to take advantage of the marital deduction and the portability election, among other options.

## REV. PROC. 2014-18

The requirements for temporary relief pursuant to Rev. Proc. 2014-18 are as follows:

- The decedent must have a surviving spouse;
- The decedent must have died after December 31, 2010 and before December 31, 2013;
- The decedent must have been a U.S. citizen or resident on the date of death;
- The taxpayer is not required to file an estate tax return as determined on the value of the gross estate and adjusted taxable gifts;
- The taxpayer did not file an estate tax return within the time prescribed for filing an estate tax return required to elect portability (as mentioned above);
- The taxpayer must properly file a Form 706 on or before December 31, 2014. The person filing Form 706 must indicate at the top of the form that the return is “FILED PURSUANT TO REV. PROC. 2014-18 TO ELECT PORTABILITY UNDER §2010(c)(5)(A).”

If the requirements are met, Form 706 will be considered as timely filed for purposes of making this election. However, if, subsequent to the procedure, it is determined that the taxpayer was required to file an estate tax return because the taxpayer was not, in actuality, exempt from the filing requirement due to a higher value estate, the extension will be deemed void.

The Rev. Proc. also states that those who are not eligible for relief under this revenue procedure may request an extension of time to make the election by making a formal request under §9100. Otherwise, until January 1, 2015, those meeting the requirements of the Rev. Proc. must use it in lieu of requesting a letter ruling.

