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Estates Must File Form 706 to Make Portability Election

The IRS on Thursday issued Notice 2011-82 to alert executors of the estates of decedents dying after Dec. 31, 2010, of the need to file a Form 706, *United States Estate (and Generation Skipping Transfer) Tax Return*, within the time prescribed by law (including extensions).

Form 706 must be filed to elect a portability exclusion, which allows the decedent's surviving spouse to take advantage of the deceased spouse's unused exclusion amount under Code section 2010 (c) (5) (A). To make the election, the executor must file a Form 706 for the decedent's estate, even if the executor is not otherwise obligated to file a Form 706.

A portability election can be made only on a Form 706 timely filed by the estate of a decedent dying after Dec. 31, 2010, and any attempt to make a portability election on a Form 706 filed for the estate of a decedent dying on or before Dec. 31, 2010, will be ineffective.

The notice says that the timely filing of a Form 706, prepared in accordance with the instructions for that form, will constitute the making of a portability election by the estate of a decedent dying after Dec. 31, 2010. Thus, by timely filing a properly prepared and complete Form 706, an estate will be considered to have made the portability election without the need to make an affirmative statement, check a box or otherwise affirmatively elect on the Form 706. Until the IRS revises Form 706 to expressly contain the computation of the deceased spousal exclusion amount, a timely filed and complete Form 706 that is prepared in accordance with the instructions for that form will be deemed to contain the computation of the deceased spousal unused exclusion amount, thereby satisfying the requirements in section 2010(c)(5)(A) for making an effective election.

The notice says that not filing a timely Form 706 will prevent the making of the election for estates that do not want to make a portability election. However, if the estate is obligated to file a Form 706 because the value of the gross estate exceeds the applicable exclusion amount, or files a Form 706 for another reason, the executor must follow the instructions for Form 706 that will describe the necessary steps to avoid making the election.

Executors may request an automatic 6-month extension to file Form 706 by filing Form 4768, *Application for Extension of Time To File a Return and/or Pay U.S. Estate (and Generation Skipping Transfer) Taxes*, before the due date for filing Form 706.

Notice 2011-82 says the IRS intends to issue regulations under section 2010(C) to address issues arising with respect to the portability election, and anticipates that those regulations will be consistent with the provisions of this notice.



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The IRS is requesting comments on certain specific issues that are listed in the Notice 2011-82. Comments on these issues will be considered if submitted in writing by Oct. 31.

2nd Article

The Internal Revenue Service today reminded estates of married individuals dying after 2010 that they must file an estate tax return to pass along their unused estate & gift tax exclusion amount to their surviving spouse.

Available for the first time this year, the new portability election allows estates of married taxpayers to pass along the unused part of their exclusion amount, normally \$5 million in 2011, to their surviving spouse. Enacted last December, this provision eliminates the need for spouses to retitle property and create trusts solely to take full advantage of each spouse's exclusion amount.

The IRS expects that most estates of people who are married will want to make the portability election, including people who are not required to file an estate tax return for some other reason. The only way to make the election is by properly and timely filing an estate tax on Form 706. There are no special boxes to check or statements needed to make the election.

The first estate tax returns for estates eligible to make the portability election (because the date of death is after Dec. 21, 2010) are due as early as Monday, Oct. 3, 2011. This is because the estate tax return is due nine months after the date of death. Estates unable to meet this deadline can request an automatic six-month filing extension by filing Form 4768. The IRS emphasized that estates of those who died before 2011 are not eligible to make this election.

The IRS plans to issue regulations providing further guidance on this election and welcomes public comment on a number of issues.