

Taxes—Guidance on How to Elect Portability of Deceased Spouse’s Estate Tax Exclusion

The Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 (2010 Act) contained a provision that allows surviving spouses to apply any unused portion of their deceased spouses’ estate tax exclusion to reduce their own estate tax liability. Spouses’ combined exclusions currently total \$10 million (as indexed for inflation after 2011) for decedents dying in 2010 through 2012. Beginning in 2013, the exclusion amount reverts back to the level set forth under 2001 law (\$1 million per spouse, as indexed since 2001), unless Congress takes action before then.

Notice 2011–82

Notice 2011–82 IRB 2011-42, page 516 (October 17, 2011) alerts executors of the estates of decedents dying after December 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) in order to elect to allow the decedent’s surviving spouse to take advantage of the deceased spouse’s unused exclusion amount, if any.



In particular, for the executor of the estate of a decedent to make the “portability election” the executor is required to file Form 706 for the decedent’s estate, even if the executor is not otherwise obligated to file. This notice also alerts executors of the estates of decedents dying after December 31, 2010, that the estate of such a decedent will be considered to have made a portability election if a Form 706 is timely filed in accordance with the instructions for that form. An election, once made, is irrevocable.

The executor of the estate of a decedent dying after December 31, 2010, who files a timely complete Form 706, but chooses not to make the portability election must follow the instructions for Form 706 that will describe the steps the executor must take to notify the Service that the decedent’s estate is not making the portability election. If the executor of such an estate chooses not to make the portability election and is not otherwise obligated to file a Form 706, not timely filing a Form 706 will effectively prevent the making of that election.

Bottom Line

As a general rule, married couples will want to ensure that the unused exclusion amount of the first spouse to die will be available to the surviving spouse. Consequently, the estates of most (if

not all) married decedents dying after December 31, 2010, will want to make the portability election. Keep in mind that the due date for filing Form 706 for those decedents dying in the first quarter of 2011 is fast approaching. Executors are also reminded of the ability to request an automatic 6-month extension by filing Form 4768 before the due date for filing Form 706.

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