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Regulations Issued for “Portability”

-by Neil E. Harl*

The concept of “portability,”¹ enacted as part of the Tax Relief Act of 2010,² as expected has become popular and, even though the statutory authority for portability is set to expire on December 31, 2012, it is believed that, unless federal estate tax is repealed, portability will be available after 2012.

The new regulations,³ filed with the Federal Register on June 15, 2012, include temporary regulations for I.R.C. § 2010.⁴ The newly issued regulations contain relatively few surprises.

Election required

The temporary regulations, as expected, require an executor electing portability to make the election on a timely-filed federal estate tax return.⁵ Thus, the election to elect portability must be made within nine months after the date of the decedent’s death or the last day of the period covered by an extension (if an extension has been obtained).⁶

The last return filed by the due date of the return, including extensions actually granted, supersedes a previously-filed return.⁷ Thus an executor may supersede a previously-filed portability election on a subsequent timely-filed estate tax return.⁸

The portability election, once made, is irrevocable once the due date of the estate tax return, including extensions actually granted, has passed.⁹

Opting out of portability election

If the executor does not wish to make the portability election, the temporary regulations state that the executor is to make an affirmative statement on the estate tax return signifying the decision not to have the portability election apply.¹⁰

“Complete and properly-prepared” estate tax return

The temporary regulations¹¹ specify that an estate tax return prepared in accordance with all applicable requirements is considered a “complete and properly-prepared” estate tax return. However, the temporary regulations provide that executors of estates that are not otherwise required to file an estate tax return,¹² do not have to report the value of property qualifying for the marital¹³ or charitable¹⁴ deductions if specified conditions are met.¹⁵

An executor choosing to make use of this special rule must estimate the total value of the gross estate (including properties that do not have to be reported on the estate tax return under this provision, based on a determination made in good faith and with due diligence regarding the value of all assets includible in the gross estate.¹⁶ The estimate is to be rounded to the nearest \$250,000.¹⁷ The Form 706 instructions are to provide ranges of dollar values and the executor must identify on the Form 706 the particular range within which falls the executor’s best estimate of the total gross estate.

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An executor, by signing the return, is certifying, under penalties of perjury, that the estimate falls within the identified range of values to the best of the executor's knowledge and belief.¹⁸ The inquiry required to determine the executor's best estimate is the same procedure as is applicable under current law to determine whether the estate has a filing obligation.

This special rule does not apply, however, to marital deduction property or charitable deduction property if – (1) the value of the property relates to, affects, or is needed to determine, the values passing from the decedent to another recipient; or (2) the value of the property is needed to determine the estate's eligibility for the provisions of sections 2032 (alternate valuation), 2032A (special use valuation), 6166 (installment payment of federal estate tax) or another provision of the Internal Revenue Code.¹⁹

Computation required on estate tax return

The temporary regulations require the executor to include a computation of the “deceased spousal exclusion amount” (the DSUE) on the estate tax return to allow portability of the decedent's DSUE amount so that the surviving spouse can take into account the decedent's DSUE amount.²⁰ The DSUE amount of a decedent with a surviving spouse is the lesser of – (a) the basic exclusion amount in effect for the year of death of the decedent or (b) the excess of the decedent's applicable exclusion amount over the sum of the amount of the taxable estate and the amount of the adjusted taxable gifts of the decedent, which together is the amount on which the tentative tax on the decedent's estate is determined.²¹ Solely for the purpose of computing the decedent's DSUE amount, the amount of adjusted taxable gifts for this purpose is reduced by the amount, if any, of the gift taxes paid for the calendar year of the gifts.²²

For property passing for the benefit of a surviving spouse in a qualified domestic trust (QDOT) further adjustments are needed.²³ The DSUE amount of the decedent must be redetermined upon the occurrence of the final distribution or other event (generally the death of the surviving spouse or the earlier termination of all QDOTs for that surviving spouse on which estate tax is imposed).²⁴

Surviving spouse's estate limited to DSUE amount of the last deceased spouse

The DSUE amount of a decedent is included in determining a surviving spouse's applicable exclusion amount if – (1) the decedent is the last deceased spouse of the surviving spouse on the death of death of the surviving spouse and (2) the executor of the decedent's estate (of the first spouse to die) elected portability.²⁵ As expected, the temporary regulations specify that the identity of the “last deceased spouse” is not affected by a subsequent marriage or divorce. That is the case if the surviving spouse is married to another individual who is living.²⁶ If a surviving spouse marries again, and that marriage ends in divorce or annulment, the subsequent death of the divorced spouse does not end the status of the prior deceased spouse as the last deceased spouse of the surviving spouse. In that case, the divorced spouse is not “the last deceased spouse” inasmuch as they were not married at the time of the death of the surviving spouse.²⁷

Expiration dates

The expiration dates of all segments of the temporary regulations

are “on or before June 15, 2015.”²⁸

ENDNOTES

¹ I.R.C. § 2010(c)(4).

² Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. No. 111-312, 124 Stat. 3301 (2010). See generally 5 Harl, *Agricultural Law* § 43.01[3][b][ii] (2012); Harl, *Agricultural Law Manual* § 5.01[5] (2012). See also Harl, “Portability—Great Idea, But Full of Planning Problems,” 22 *Agric. L. Dig.* 137 (2011); Harl, “The Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010,” 22 *Agric. L. Dig.* 1 (2011).

³ T.D. 9593, 77 Fed. Reg. 36150 (June 18, 2012).

⁴ See Temp. Treas. Reg. § 20.2010-0T, Temp. Treas. Reg. § 20.2010-1T, Temp. Treas. Reg. § 20.2010-2T, Temp. Treas. Reg. § 20.2010-3T. See also NPRM REG 141832-11.

⁵ Temp. Treas. Reg. § 20.2010-2T(a).

⁶ Temp. Treas. Reg. § 20.2010-2T(a)(1).

⁷ *Id.*

⁸ See Temp. Treas. Reg. § 20.2010-2T(a)(3)(i). But see Temp. Treas. Reg. § 20.2010-2T(a)(6) where contrary elections are made by more than one person permitted to make the election.

⁹ Temp. Treas. Reg. § 20.2010-2T(a)(4).

¹⁰ Temp. Treas. Reg. § 20.2010-2T(a)(3).

¹¹ Temp. Treas. Reg. § 20.2010-2T(a)(7)(i).

¹² See I.R.C. § 6018(a) (authority for who is required to file an estate tax return).

¹³ I.R.C. § 2056.

¹⁴ I.R.C. § 2055.

¹⁵ Temp. Treas. Reg. § 20.2010-2T(a)(7)(i).

¹⁶ Temp. Treas. Reg. § 20.2010-2T(a)(7)(ii)(A).

¹⁷ Temp. Treas. Reg. § 20.2010-2T(a)(7)(ii)(B).

¹⁸ Temp. Treas. Reg. § 20.2010-2T(a)(7)(ii)(B).

¹⁹ Temp. Treas. Reg. § 20.2010-2T(a)(7)(ii)(A).

²⁰ Temp. Treas. Reg. § 20.2010-2T(b)(1).

²¹ I.R.C. § 2001(b)(1).

²² Temp. Treas. Reg. § 20.2010-2T(c)(2).

²³ Temp. Treas. Reg. § 20.2010-2T(c)(4).

²⁴ See I.R.C. § 2056A.

²⁵ Temp. Treas. Reg. § 20.2010-3T(a)(1).

²⁶ Temp. Treas. Reg. § 20.2010-3T(a)(3).

²⁷ *Id.*

²⁸ Temp. Treas. Reg. § 20.2010-1T(f); Temp. Treas. Reg. § 20.2010-2T(f); Temp. Treas. Reg. § 20.2010-3T(g).