

## Part III – Administrative, Procedural, and Miscellaneous

### Extension of Time to File an Estate Tax Return Solely to Elect Portability of a Deceased Spousal Unused Exclusion Amount

Notice 2012-21

#### **SECTION 1. PURPOSE**

This notice grants to qualifying estates, for the purpose of electing under section 2010(c)(5)(A) of the Internal Revenue Code (Code) (a “portability election”), a six-month extension of time for filing Form 706 (United States Estate (and Generation-Skipping Transfer) Tax Return). This extension applies when the executor of a qualifying estate did not file a Form 4768 (Application for Extension of Time To File a Return and/or Pay U.S. Estate (and Generation-Skipping Transfer) Taxes) within nine months after the decedent’s date of death, and therefore the estate did not receive the benefit of the automatic six-month extension. An executor of a qualifying estate that wants to obtain the extension granted by this notice must file the application for a six-month extension no later than 15 months after the decedent’s date of death. With the extension granted by this notice, the Form 706 of a qualifying estate will be due 15 months after the decedent’s date of death.

Generally, this notice defines a qualifying estate as the estate of a decedent (1) whose date of death is after December 31, 2010, and before July 1, 2011, (2) who is survived by a spouse, and (3) whose gross estate does not exceed the \$5,000,000 basic exclusion amount for 2011. The extension provided in this notice is granted pursuant to authority under section 6081 of the Code.

## **SECTION 2. BACKGROUND**

### **2.01. In General**

Sections 302(a)(1) and 303(a) of the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. No. 111-312, 124 Stat. 3296, 3302 (2010), amended section 2010(c) of the Code to allow the estate of a decedent who is survived by a spouse to make a portability election to permit the surviving spouse to apply the decedent's unused exclusion (the deceased spousal unused exclusion amount, or DSUE amount) to the surviving spouse's own transfers during life and at death. The portability election may be made only by the estates of decedents dying after December 31, 2010.

Section 2010(c)(2), as amended, defines the applicable exclusion amount used to determine the applicable credit amount as the sum of the basic exclusion amount and, in the case of a surviving spouse, the DSUE amount. Section 2010(c)(3) defines the basic exclusion amount as \$5,000,000, to be adjusted for inflation in each year after calendar year 2011. Section 2010(c)(4) defines the DSUE amount as the lesser of (A) the basic exclusion amount or (B) the excess of the basic exclusion amount of the last deceased spouse of the surviving spouse over the amount with respect to which the

tentative tax is determined under section 2001(b)(1) on the estate of such deceased spouse.

Section 2010(c)(5)(A) provides certain requirements that the executor of a deceased spouse must satisfy to allow a surviving spouse to apply the DSUE amount of a deceased spouse. In particular, the executor of the estate of the deceased spouse must file a Form 706 that includes a computation of the DSUE amount and on which the executor elects portability of the DSUE amount. Under section 2010(c)(5)(A), a portability election is effective only if made on a Form 706 that is filed within the time prescribed by law (including extensions) for filing such return.

## **2.02. Filing Dates and Availability of an Extension**

Under section 6075(a), the due date for filing an estate tax return is nine months after the date of the decedent's death. Section 6081(a) provides that the Secretary may grant a reasonable extension of time for filing any return and that, except in the case of taxpayers who are abroad, no such extension may be for more than six months.

Section 20.6081-1(a) of the Estate Tax Regulations provides that a request for an extension of time to file Form 706 must be made by filing Form 4768 with the Internal Revenue Service (Service) office designated in the application's instructions and must include an estimate of the amounts of estate and generation-skipping transfer tax liabilities with respect to the estate.

Section 20.6081-1(b) grants an estate an automatic six-month extension of time to file Form 706 if Form 4768 is filed on or before the due date for filing Form 706 and in accordance with the procedures under § 20.6081-1(a).

Section 20.6081-1(c) provides that the Service, in its discretion and upon the showing of good and sufficient cause, may grant an extension of time to file Form 706 to an estate that did not request an automatic extension of time to file Form 706 prior to the due date for Form 4768 prescribed in § 20.6081-1(b). Such an extension cannot be for more than six months beyond the filing date prescribed in section 6075(a), unless the executor is abroad. Section 20.6081-1(c) further provides that, to obtain such an extension, Form 4768 must be filed in accordance with the procedures under § 20.6081-1(a) and must contain a detailed explanation of why it is impossible or impractical to file a reasonably complete Form 706 by the due date, and an explanation showing good cause for not requesting the automatic extension.

### **2.03. Notice 2011-82**

Notice 2011-82, 2011-42 I.R.B. 516, issued on October 17, 2011, alerts taxpayers of the applicable requirements to elect portability of the decedent's DSUE amount. In addition, Notice 2011-82 announces that the estate of a decedent who is survived by a spouse will be deemed to elect portability of the DSUE amount by the timely filing of a complete and properly-prepared Form 706. Furthermore, the notice provides that 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 DSUE amount until such time as the Service revises Form 706 to expressly contain the computation of the DSUE amount. Notice 2011-82 also provides guidance to the estates of deceased spouses who choose not to make the portability election. Finally, Notice 2011-82 announces that the Treasury Department (Treasury) and the Service intend to issue regulations to implement the portability provisions included in

section 2010(c) of the Code and, therefore, the notice invites public comment on a number of issues affecting portability for Treasury and the Service to consider.

### **SECTION 3. DISCUSSION**

In response to the invitation for public comment on issues affecting portability in Notice 2011-82, Treasury and the Service have received comments on a variety of issues. Several commentators raised the issue of an extension of time to file Form 706 to make the portability election. These commentators noted that the executors of estates of decedents dying in 2011, particularly during the early part of 2011, did not have the benefit of guidance on electing portability of the decedent's DSUE amount and, further, that executors of estates having assets with a value not in excess of \$5,000,000 might not have known about the requirement to file Form 706 to make the portability election at all.

In addition to the comments received in response to the invitation for public comment in Notice 2011-82, the Service has also received inquiries regarding the availability of an extension to file Form 706 from practitioners representing estates of decedents dying in early 2011 that had missed the due date for filing Form 706 and Form 4768.

Treasury and the Service agree that many executors of estates of decedents who died in the first half of 2011 that were not otherwise required to file Form 706 because of the value of the gross estate may have been unaware of the requirement to file Form 706 to make the portability election. Such an executor would not have filed Form 706 and, therefore, would not have made the portability election that is deemed made by the timely filing of a complete and properly-prepared Form 706. For the same

reasons, such an executor would not have timely filed Form 4768 to obtain an automatic six-month extension of time to file Form 706. Accordingly, Treasury and the Service believe it is appropriate to offer to executors of qualifying estates a six-month extension of time to file Form 706 until 15 months after the decedent's date of death, provided that the executor of the estate files an application for a six-month extension on Form 4768 under the authority of this notice before the date that is 15 months from decedent's date of death.

#### **SECTION 4. SCOPE AND APPLICATION**

**4.01.** This notice applies to qualifying estates of decedents who are citizens or residents of the United States. For purposes of this notice, a qualifying estate is an estate in which:

- a. The decedent is survived by a spouse;
- b. The decedent's date of death is after December 31, 2010, and before July 1, 2011; and
- c. The fair market value of the decedent's gross estate does not exceed \$5,000,000.

**4.02.** For purposes of this notice, an estate is not a qualifying estate if the estate effectively requested an automatic six-month extension of time to file Form 706 under § 20.6081-1(b) by timely filing Form 4768 on or before the due date for filing Form 706.

**4.03.** If it is later determined that the estate does not meet the requirements of a qualifying estate, no extension will be treated as granted under this notice, and the Form 706, therefore, will not be timely.

## **SECTION 5. GUIDANCE**

**5.01.** Treasury and the Service grant the executor of a qualifying estate a six-month extension of time until 15 months after the decedent's date of death to file Form 706 if the executor meets the following requirements:

- a. The executor files Form 4768 with the Service office designated in the form's instructions;
- b. The executor files Form 4768 no later than 15 months from the decedent's date of death; and
- c. The executor enters at the top of Form 4768 the notation "Notice 2012-21, Extension for Good Cause Shown" or otherwise sufficiently notifies the Service on or with Form 4768 that Form 4768 is being filed pursuant to this notice.

**5.02.** The executor of a qualifying estate following the requirements of subsection 5.01 of this section will be deemed to have shown good and sufficient cause and to have provided all explanations required under § 20.6081-1(c) without the need for the executor to include any further explanations on Form 4768.

**5.03.** If, prior to the issuance of this notice, an executor of a qualifying estate filed a Form 706 after the due date for filing Form 706 had passed, but before 15 months from the decedent's date of death, without having timely requested an automatic six-month extension of time to file Form 706, the executor may file Form 4768 in accordance with the requirements of this section and the extension will relate back to the due date of Form 706.

**5.04.** An executor of a qualifying estate may file Form 4768 at the same time as the executor files Form 706, as long as both are filed on or before the date that is 15 months after decedent's date of death.

**5.05.** For purposes of section 6081, except in the case of an executor abroad, Treasury and the Service cannot grant additional extensions of time to file Form 706 beyond the six-month extension granted in this notice, regardless of whether an executor files a Form 4768 requesting an additional extension of time to file.

#### **DRAFTING INFORMATION**

The principal author of this notice is Karlene Lesho of the Office of Associate Chief Counsel (Passthroughs and Special Industries). For further information regarding this notice, contact Karlene Lesho at (202) 622-3090 (not a toll-free call).