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Estates Must File Form 706 to Make Portability Election

The IRS 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.

Anthony J. Medico, Esq., has practiced law for over 27 years. To ask a question regarding this article, send an e-mail to info@medicoandassociates.com or call us at (203) 661-8151. To read more highly informative Estate Planning articles, visit our website at www.medicoandassociates.com, where you can also download our free Estate Planning Survival Guide. Enjoy.

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