



Simplified IRS Relief for Same-Sex Couples and Others

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On January 27, 2014, the Internal Revenue Service announced in Revenue Procedure 2014-18 a simplified procedure for certain estates to make a late portability election under section 2010(c)(5)(A) of the Internal Revenue Code. Rather than seeking a private letter ruling and paying a user fee, the estate can file a properly completed estate tax return and write at the top "Filed Pursuant to Rev. Proc. 2014-18 To Elect Portability Under §2010(c)(5)(A)."

Background. The portability election allows estates of married taxpayers to pass along the unused part of their exclusion amount (\$5 million in 2011, \$5,120,000 in 2012, and \$5,250,000 in 2013) to their surviving spouses. To make the election, the estate files an estate tax return.

By statute, an estate that is greater than the basic exclusion amount (\$5,000,000 in 2011, \$5,120,000 in 2012, \$5,250,000 in 2013) must file an estate tax return within nine months of death unless an extension is granted. An estate that is less than the basic exclusion amount is generally not required to file an estate tax return and is only required to file an estate tax return if making the portability election. By regulation, to make the portability election, the estate tax return must be filed within nine months of death, unless an extension is granted.

When the due date to file an estate tax return is determined by regulation and not by statute, an estate that did not timely file an estate tax return can seek 9100 relief (Treas. Reg. §301.9100-3) to request an extension of time to file an estate tax return and to elect portability. The estate pays a user fee and requests a private letter ruling.

Under Revenue Procedure 2014-18, to make a late portability election a qualifying estate is not required to pay a user fee and is not required to request 9100 relief through a private letter ruling. The estate simply writes across the top of the return "Filed Pursuant to Rev. Proc. 2014-18 To Elect Portability Under §2010(c)(5)(A)."

Applicable Estates.

Some estates that were not required to file an estate tax return did not timely file an estate tax return to elect portability and would now like to make the portability election. For example, the portability provisions were originally set to expire at the end of 2012, but Congress made them permanent in the American Taxpayer Relief Act of 2012. Some estates may not have made the election under the belief that the benefits of portability would not be permanent. As another example, the United States Supreme Court's decision in *United States v. Windsor*, 133 S. Ct. 2675 (2013) and Revenue Ruling 2013-17 recognized the marriage of same-sex couples for federal tax purposes. A surviving same-sex spouse may have benefited from a portability election, and no election was made under the belief that federal tax law would not recognize the marriage. Revenue Procedure 2014-18 gives the estate 9100 relief and an opportunity to make a late election. It appears that no reason must be given by the estate for requesting the relief.

This relief applies to an estate where:

- (1) the decedent has a surviving spouse (of the same or opposite sex);
- (2) the decedent died in 2011, 2012 or 2013;
- (3) the decedent was a United States citizen or resident; and
- (4) the estate was not statutorily required to file an estate tax return (*i.e.*, the gross estate was less than the basic exclusion amount), did not timely file an estate tax return, and is only filing to elect portability.

If the decedent died after December 31, 2013, the Revenue Procedure will not apply, and the estate will be required to request an extension by requesting 9100 relief through a private letter ruling and paying the user fee.

If an estate has already requested 9100 relief, the estate can withdraw its request and comply with this Revenue Procedure.

Caution.

Some surviving spouses or the estates of some surviving spouses may have paid gift tax or estate tax that would not have been due if the portability election had been made. The surviving spouse or the surviving spouse's estate that paid a tax must still make a claim for credit or refund of a tax overpayment. The claim must be made within two years from the date the tax was paid or three years from the date the return was filed (whichever period is later).

The Internal Revenue Service will recognize a timely filed claim for refund, even if the estate tax return making the portability election is not filed before the claim for refund is filed, so long as the estate tax return making the portability election is properly filed before December 31, 2014.

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