

**Steve Leimberg's Estate Planning
Email Newsletter Archive Message #2535**

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**Subject: Beth Shapiro Kaufman & Extension of Time to Make
Portability Election: Additional Remedies**

“In comments before the Federal Bar Association on March 3, 2017, IRS Senior Technical Reviewer Karlene Lesho discussed the ability of an estate to obtain an extension of time to make a portability election. While the ability to request a private letter ruling under Treasury Regulation section 301.9100-3 is well known and is even discussed in the preamble to the portability regulations, obtaining such a ruling is expensive and time consuming.

Ms. Lesho mentioned one alternative: using Form 4768 to obtain an extension, provided that the failure to make the election is discovered within 15 months of death. In addition, relief can be obtained in certain circumstances under Treasury Regulation section 301.9100-2. This commentary details some of the situations in which relief can be obtained through these methods, without a private letter ruling.”

Beth Shapiro Kaufman provides members with important commentary that reviews alternatives to a private ruling where an estate seeks to obtain an extension of time to make a portability election.

Beth Shapiro Kaufman is a Member in **Caplin & Drysdale's** Washington, D.C., office; she also serves as President of the Firm. Ms. Kaufman assists wealthy individuals with their estate planning, with a focus on minimizing taxes. She also advises lawyers and other professionals on complex issues regarding estate, gift, and generation-skipping transfer taxes. Prior to rejoining Caplin & Drysdale in 2001, Ms. Kaufman worked for over six years in the Treasury Department's Office of Tax Policy, where she had principal responsibility for all tax policy matters affecting trusts and estates. Ms. Kaufman is a Fellow of the American College of Trust and Estate Counsel. She is a graduate of

Harvard Law School, where she was Notes Editor of the *Harvard Law Review*, and Pomona College.

Here is her commentary:

EXECUTIVE SUMMARY:

In comments before the Federal Bar Association on March 3, 2017, IRS Senior Technical Reviewer Karlene Lesho discussed the ability of an estate to obtain an extension of time to make a portability election. While the ability to request a private letter ruling under Treasury Regulation section 301.9100-3 is well known and is even discussed in the preamble to the portability regulations, obtaining such a ruling is expensive and time consuming. Ms. Lesho mentioned one alternative: using Form 4768 to obtain an extension, provided that the failure to make the election is discovered within 15 months of death. In addition, relief can be obtained in certain circumstances under Treasury Regulation section 301.9100-2. This commentary details some of the situations in which relief can be obtained through these methods, without a private letter ruling.

FACTS:

A portability election is made by timely filing a federal estate tax return, Form 706, for a decedent who does not use his/her full exemption amount and is survived by a spouse. Unfortunately, many eligible estates fail to make such a timely election. Typically the failure occurs because no timely estate tax return is filed, but sometimes the return is timely filed with the box indicating no portability election is being made mistakenly checked.

The so-called “9100 regulations” (found at section 301.9100 of the Treasury Regulations) give the IRS the discretion to grant relief for making late elections in certain circumstances. If the deadline for making the election is prescribed by statute, then Treasury Regulation 301.9100-2 allows only a 6-month extension of time to make the late election. If the deadline for making the election is prescribed by regulation, however, then Treasury Regulation 301.9100-3 allows the IRS more latitude to allow a late election as long as the taxpayer can

demonstrate that it acted reasonably and in good faith, and that allowing a late election will not prejudice the government.

Following the 9100 regulations, the preamble to the portability regulations distinguishes the relief available to those estates that do not have a filing requirement from that available to estates that do meet the filing threshold. The IRS reasons that the statutory deadline of nine months after death applies only to estates that have a filing obligation under Code section 6018. Section 6018 imposes a filing obligation on estates with a gross estate in excess of the basic exclusion amount in effect under Code section 2010(c) for the year of death (currently, in 2017, \$5,490,000). If the gross estate exceeds the basic exclusion amount, even if there will be no tax due on account of the marital deduction or the charitable deduction, the estate has a filing requirement under Code section 6018. Such estates, then, have a filing deadline prescribed by statute and can only get relief under the 301.9100-2 regulations, not the 301.9100-3 regulation. Only if the gross estate is below the filing threshold is the election deemed to be a “regulatory” election, allowing for the possibility of relief under the 9100-3 regulation.

Ms. Lesho, however, referred to avenues of relief other than those under the 9100-3 regulations. These options are discussed briefly below.

COMMENT:

No Return Filed: Relief by Filing Form 4768. Ms. Lesho was referring in her talk to extensions that can be obtained by filing Form 4768 within 15 months of death. An estate can get a six-month extension of time to file the Form 706 by filing a Form 4768. If the request is made prior to the due date of the estate tax return, the extension is automatic. However, if the original due date has passed but the extended (15 month) date has not passed, an extension of time can be granted for “good cause.” Treasury Regulation section 20.6081-1(c) gives the IRS discretion, “upon the showing of good and sufficient cause,” to grant an extension of time to file the estate tax return. “Such an extension may be granted to an estate that did not request an automatic extension of time to file Form 706 prior to the due date”; however, the extension cannot be for more than 6 months beyond the due date unless the executor is abroad. Treas. Reg. section 20.6081-1(c).

In the event that no timely Form 706 was filed, a request for an extension to file the Form 706 can be filed any time before the date that is 15 months after the date of death. "Good and sufficient cause" must be shown. The explanation provided on Form 4768 must address both the reason why a timely return was not filed and why a request for an extension of time was not filed before the due date of the return. Then, whether or not a response has been received from the IRS, the Form 706 must be filed by the extended due date. If the extension has been approved, documentation of that approval should be enclosed with the Form 706; if it has not been approved, enclose a copy of the request for extension.

We have used this technique successfully in two circumstances in which estates that exceeded the filing threshold failed to make a timely portability election. In one case, the Form 706 had been completely prepared, signed, and packaged for mailing, and a staff member failed to mail the package on a Friday before a holiday weekend. Upon return to the office on Tuesday, the accountant discovered the unmailed package in his office. This situation was explained as the "good and sufficient cause" for failure to file on time or request a timely extension of time to file. The extension was granted, the return was timely filed by the extended due date for the return, and a timely portability election was thus made.

In another case, an attorney intended to file a Form 706 electing portability but due to some personal issues, failed to do so. The error was discovered a few weeks before the 15-month anniversary of the death. Once again, we advised the attorney to file a request using Form 4768 for an extension of time to file the Form 706. Before hearing back with regard to the extension, the attorney filed the Form 706 by the extended due date. The extension of time was granted and the return accepted with its portability election.

Incorrect Return Filed: Relief Under Section 9100-2. The above technique is available only if no return was timely filed. However, even if a timely return is filed, if the "no portability" box on the return is mistakenly checked and this is discovered before the extended due date, it should be remediable.

The preamble to the portability regulations views this as an unlikely situation: “Section 301.9100-2(b) provides an automatic six-month extension of time for making certain statutory and regulatory elections if the return is timely filed. Because the portability election is deemed to be made by the timely filing of a complete and properly prepared estate tax return, this relief provision will not be helpful with regard to the portability election unless the return that was timely filed was not complete or properly prepared and that insufficiency is corrected within six months from the unextended due date of the return.” TD 9725, June 16, 2015 (preamble). In my experience, however, section 9100-2 relief may be more helpful than the preamble anticipates.

Note that the election in Code section 2010(c)(5) is an election “in” to portability. That election, once made, is irrevocable. Code section 2010(c)(5)(A). As the IRS has generously structured the election on Form 706, however, the executor for a decedent with a surviving spouse makes the election simply by filing the Form 706. Only if the executor does not wish to make such an election is a box checked on Form 706. Thus the IRS, by this language, has turned an election “in” into an election “out.” This fact can be used to the taxpayer’s advantage.

In our office, we have instructed everyone who works on estate tax returns that they are never to check the box electing out of portability. However, we are aware of cases in which other preparers have checked that “opt out” box. Checking that box could give rise to a situation in which “the return that was timely filed was not complete or properly prepared,” thus opening up an opportunity to get a six-month extension to make the election under section 301.9100-2.

We have seen one such situation. There, the timely filed estate tax return included assets that did not in fact belong to the decedent (assets were included on the decedent’s return that were actually owned by the spouse’s revocable trust). In addition, certain assets included in the estate were valued as of the first day of the month following the death rather than as of the date of death. In light of the over-reporting of assets caused by these errors, the return preparer thought that the decedent had used all of his basic exclusion and thus had no remaining exclusion to “port.” The preparer checked the “opt out” of portability box.

We sought relief under section 301.9100-2 to make a late portability election. Even though the due date in this case was statutory (due to the size of the estate), section 301.9100-2 allows relief for a six-month period after the deadline for the statutory election. In fact, such an extension is automatic under Treasury Regulation section 301.9100-2(b) as long as the taxpayer timely filed the return on which the election should have been made and takes corrective action within the six-month extension period.

Section 301.9100-2(c) of the regulations states that the taxpayer takes the appropriate corrective action by “filing an original or an amended return for the year the regulatory or statutory election should have been made and attaching the appropriate form or statement for making the election.” In accordance with Treasury Regulation section 301-9100-2(d), the request is made by filing the amended Form 706 marked “FILED PURSUANT TO §301.9100-2” and mailing it to the same address as the original Form 706.

The success of this strategy depends on the position that checking the “opt out” box on the estate tax return is not the election referred to in Code section 2010(c)(5). Clearly it is not. The election described in the Code is an election “on such return that such [DSUE] amount may be so taken into account.” Nothing in the Code prescribes an “opt out” election or makes an “opt out” election irrevocable. Thus a return filed with the “opt out” box checked can be amended, and section 301.9100-2 grants an automatic extension of six months from the due date of the Form 706 in which to do this.

This strategy was successfully used in the case described above to override the “opt out” election. The amended return making a portability election, filed pursuant to section 301.9100-2 within six months of the original due date for the 706, was accepted by the IRS. This strategy should be available to correct any case in which the “opt out” box was mistakenly checked and the decedent actually had exemption remaining to port. Section 301.9100-2 does not require any “other” error other than the failure to make the portability election. Thus even if inadvertently opting out of portability is the only error on the return, relief to make the late election within 6 months of the statutory filing deadline should be available.

**HOPE THIS HELPS YOU HELP OTHERS MAKE A *POSITIVE*
DIFFERENCE!**

Beth Shapiro Kaufman

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CITES:

Preamble, Treasury Regulation Section 20.2010, TD 9725 (June 16, 2015); Treasury Regulation Section 20.6081-1(c); Treasury Regulation Section 301.9100-2; Treasury Regulation Section 301.9100-3.