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TRUSTS AND ESTATES

New Extended Deadlines for Portability Election Filing

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On June 9, the IRS issued Rev. Proc. 2017-34, 2017-26 IRB, which provides a more liberal timeframe for certain estates to make the federal estate tax portability election. The additional time is only available for estates that are not otherwise required to file a federal estate tax return because the value of the gross estate is below a decedent's remaining federal estate tax exemption. For 2017, the federal estate tax exemption amount is $5.49 million (and is indexed for inflation each year). This exemption represents the amount that an individual can transfer to the objects of his or her bounty free of federal estate and gift tax. Estates with gross asset values below the exemption amount are not required to file federal estate tax returns, except to the extent that a portability election is desired.

The portability election is a relatively new feature of the federal estate and gift tax regime that came into effect under the 2013 American Taxpayer Relief Act (ATRA), and, to a large degree, replaces the prior "use it or lose it" structure of the federal estate tax exemption rules. The portability election enables a surviving spouse to essentially "inherit" the decedent's unused federal estate tax exemption amount and, thus, treat both exemptions (the surviving spouse's exemption along with the exemption of the first spouse to die) as available to the marital unit. Thus, to the extent that the first deceased spouse does not make full use of his or her available federal estate tax exemption, an election can be made to add (or "port") the decedent's unused exemption to the surviving spouse's exemption.

For example, if a husband dies in 2017 and leaves all of his assets outright to his wife, if he had not used any portion of his $5.49 million exemption for gifts during his lifetime, the entire $5.49 million of available exemption may be ported to the wife. When the wife later dies, if she remains eligible to benefit from the portability regime, she will have $10.98 million in available exemption (i.e., her husband's unused $5.49 million exemption plus her own $5.49 million exemption), which her estate can then allocate to her assets remaining at death. The amount of the exemption ported to the surviving spouse is called the deceased spousal unused exclusion, or "DSUE" amount.

The portability election is made by timely filing a properly completed IRS Form 706 (federal estate tax return), which must include a computation of the DSUE amount. Until the

issuance of Rev. Proc. 2017-34, timely filing always meant that the return needed to be filed nine months after the decedent's date of death or the last day of the period covered by a timely filed extension request, which could extend the filing deadline for another six months (for a total of 15 months).

There have been many cases where the deadline to file for portability was missed because surviving spouses did not learn about the availability of the portability election until more than nine months after the death of their spouses. However, before the issuance of Rev. Proc. 2017-34 there were two opportunities for filing effective portability elections after missing the deadline. First, Rev. Proc. 2014-18, 2014-7 I.R.B. 513 provided blanket extensions to all surviving spouses of decedents with estates below the filing threshold for returns filed before Dec. 31, 2014. After that date, the only remedy for taxpayers was through a private letter ruling request for an extension pursuant to Reg. Section 301.9100-3 (Section 9100 relief). Section 9100 relief could be granted if the taxpayer established that the taxpayer acted reasonably and in good faith and that the grant of relief will not prejudice the interests of the government. Private letter rulings, while liberally granted on this issue, can nevertheless be quite costly and the results are uncertain. In addition to paying a lawyer for the time involved for the preparation of the letter request, there are the user fees payable to the IRS for the filing can run up to $10,000.

Because of the numerous private letter ruling requests to the IRS for extensions of time to elect portability in recent years, both as an accommodation to taxpayer and to free up resources at the IRS, under Rev. Proc 2017-34 the IRS has now provided a permanently available simplified method for estates below the filing threshold for an estate tax return to make the estate tax portability election more than 9 months after the death of the decedent. The simplified method is only available to estates that are not required to file an estate tax return based on the value of the gross estate and was effective as of June 9.

Now, for a portability election to be effective, such returns will be due the later of Jan. 2, 2018, or the second anniversary of the decedent's date of death. So, essentially there is an amnesty period until Jan. 2, 2018, for all estates, and thereafter a 15-month automatic extension period (beyond the nine-month initial deadline) will be available to qualifying estates (without requiring a timely extension request prior to Jan. 2, 2018, or the actual two-year deadline). In order to secure this automatic extension, the personal representative filing the federal estate tax return to elect for portability simply needs to specify in capital letters on the top of the return that it is being "Filed pursuant to Rev. Proc. 2017-34 to elect portability under Section 2010(c)(5)(A)." Should the estate fail to meet the deadline within two years of the decedent's death (or file before Jan. 2, 2018), then the personal representative would have to proceed with a private letter ruling request to try to obtain Section 9100 relief, and, as mentioned above, that can be both costly and uncertain.

It is important for attorneys, accountants and other professional advisors to properly advise personal representatives and surviving spouses (as well as, perhaps, the children of the decedent who may benefit from the potential tax benefits) about the significance of a portability election. Even in cases where the surviving spouse currently has assets valued below his or her $5.49 million exemption (after taking into account any inheritance received from the first spouse), portability should still be considered for two reasons: legislation could be enacted in the future to lower the exemption amount to a number which is less than $5.49 million; and the assets of the surviving spouse may increase by the time the surviving spouse dies to a number which is greater than his or her exemption amount. Without filing a

portability election, if either of those two scenarios were to come to fruition, the estate of the surviving spouse may be faced with a federal estate tax (which is currently a tax imposed at the rate of 40 percent, but, in recent decades, such rate has been as high as 55 percent) on any amount in the estate which is over the then applicable exemption amount. A timely filed portability election may have eliminated such a tax, or at least may have reduced the impact of it. •

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