

## PORTABILITY OF DECEDENT'S LIFETIME EXEMPTION

November 2017

This letter is being sent to clients who may be affected by the recent guidelines established by the Internal Revenue Service in Revenue Procedure 2017-34.

Please consult with your estate planning attorney and other advisors or call my office to discuss whether the simplified filing procedures are applicable to your specific situation and to obtain guidance whether it would be advisable to claim the portability election.

### Background

In 2011, each deceased taxpayer was granted a \$5 million lifetime exclusion from the estate tax; essentially exempting decedents from filing an estate tax return (**Form 706**) if total net worth on the date of death was under the threshold amount. The \$5 million exemption is indexed for inflation and now (in 2017) equals \$5.49 million.

Because the lifetime exclusion is applied to an individual, it is for the most part a use-it-or-lose-it proposition. Generally, taxpayers must total their assets and subtract the applicable exclusion from that total to arrive at the taxable estate. As a result, only those decedents with medium to large estates which exceed the exclusion are subject to the federal estate tax which is assessed at rates as high as 40%. Smaller estates use up as much of the exclusion as needed to offset assets and bring the taxable amount to zero. Any portion of the exclusion that remains unused is forever lost UNLESS the decedent was married at the time of death.

### Special Election for Married Taxpayers

The unused portion of a deceased spouse's exemption may, in fact, be passed to the surviving spouse for later use *if affirmatively elected*. To claim the portability election, the decedent's personal representative (executor or successor trustee) must file **Form 706** on the decedent's behalf; thereby notifying the tax authority of the intention to pass (port) the Deceased Spouse's Unused Exemption (DSUE) to the surviving spouse. The survivor may then combine the DSUE amount with the applicable exclusion in the year of the survivor's death to exclude a greater portion of assets at the second death.

For example, if a husband with a net worth of \$3 million passed away in 2011 when the exclusion was set at \$5 million, his surviving wife could have "inherited" \$2 million of his unused exemption. If the wife later died in 2017, her estate would be sheltered by the currently applicable exclusion as well as her husband's ported exclusion; ultimately, as much as \$7.49 million would be sheltered from the estate tax.

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## Filing Requirements

Unfortunately, many taxpayers were unaware that **Form 706** was required to be filed to elect portability. Instead, personal representatives of many small estates simply assumed that since the decedent's assets did not exceed the filing threshold, no estate tax filing was required. They only later learned that failure to file meant that portability would be forfeited. That's where recent IRS guidance comes to the rescue and allows taxpayers to submit a simplified **Form 706**.

For estates which do not otherwise have a filing requirement and simply wish to claim the portability election, the filing deadline has been extended to 2 years from the date of death (rather than the usual 9 months). Decedents who passed away any time between 2011 and 2016 have been granted a special extension to file **Form 706** *until January 2, 2018*.

## Time is of Essence

Hence, I am communicating with you to make you aware of a potential tax savings opportunity before time runs out. Surviving spouses may wish to incur the cost and inconvenience of submitting **Form 706** if they wish to preserve the DSUE. Portability typically yields the greatest benefit if the survivor's estate is already close to the current filing threshold or may grow to the applicable exemption amount in the coming years. Each situation has to be assessed on its own merits to determine the likelihood that the survivor's assets will grow to meet or exceed the lifetime exclusion amount. There's no one-size-fits-all answer.

Since time is of essence, please contact my office on or before November 15<sup>th</sup> if you would like me to prepare **Form 706** so that you may timely claim the portability election.

*Opinions and recommendations stated herein are limited to those issues discussed above. This opinion does not consider or provide a conclusion with respect to any additional issues that may exist. Please be advised that any tax advice in this communication, including attachments and enclosures, was not intended or written to be used--and cannot be used by any taxpayer--for the purposes of avoiding any penalties that may be imposed by the tax authorities.*

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