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## Federal Estate Tax Opportunities

The federal estate tax laws changed significantly in 2017. The first such change occurred on June 9, 2017, when the Internal Revenue Service (IRS) issued Revenue Procedure 2017-34. This Revenue Procedure provides for an extension of time to elect portability.

As described below, portability allows the surviving spouse to use the first deceased spouse's unused federal estate tax exemption. More recently, on December 22, 2017, the President signed the Tax Cuts and Jobs Act ("TCJA") into law. The TCJA raises the federal gift and estate tax exemption, as well as the generation-skipping transfer tax exemption, beginning on January 1, 2018. It is important for practitioners to be aware of these changes and to advise clients accordingly.

### The Increased Exemption

The Internal Revenue Code (IRC) sets the federal estate and gift tax exemption at \$5,000,000, adjusted annually for inflation.<sup>1</sup> Before Congress passed the TCJA, the federal estate and gift tax exemption was scheduled to increase to \$5,600,000 on January 1, 2018. However, for estates of decedents dying or gifts made after December 31, 2017 and before January 1, 2026, the TCJA doubles the exemption amount to \$10,000,000, indexed annually for inflation.<sup>2</sup> As such, the federal estate and gift tax exemption in effect for the calendar year beginning January 1, 2018 is \$11,200,000. The increased exemption (adjusted annually for inflation) will remain in effect until the applicable provisions of the TCJA expire on December 31, 2025.

### An Increased Benefit

The federal gift and estate tax exemption applies on an individual basis for citizens and residents of the United States.<sup>3</sup> Portability provides a special benefit for married couples who are United States citizens. The executor of the first deceased spouse's estate can transfer any unused federal estate and gift tax exemption (otherwise known as the deceased spousal unused exclusion amount, or DSUE) to the surviving spouse by making a portability election. Beginning January 1, 2018, it will be possible for married couples to transfer up to \$22,400,000 without paying federal estate or gift taxes.

Portability is available for decedents dying after December 31, 2010. If portability is desired, the executor must make a portability election by timely filing a complete and properly prepared estate tax return (Form 706).<sup>4</sup> Form 706 is complex, and the executor should seek competent legal and accounting advice to prepare the return, which may be costly. However, if the executor is filing solely to elect portability, a simplified filing is permitted, which may alleviate the cost and burden to the executor and the estate.<sup>5</sup>

### Electing Portability

In some cases, a court-appointed executor or administrator may not be necessary to administer a decedent's estate. For example, if a married couple has title to all of their assets by joint ownership, probate will not be necessary for the first deceased spouse's estate. In such a case, an executor would not be appointed by a court.

Fortunately, to elect portability, a court-appointed executor is not required. IRC § 2203 provides that for estate tax purposes, the term "executor" includes "any person in actual or constructive possession of any property of the decedent."<sup>6</sup> Therefore, a surviving spouse or other individual who receives property from the de-

ceased spouse's estate is considered an executor, and may file an estate tax return without letters of appointment issued by a court.

### Timely Filing

The portability election must be made on a timely filed Form 706. To be considered timely, Form 706 must be filed within the nine-month anniversary of the decedent's death, or the fifteen-month anniversary if the executor files an extension of time to file Form 706.<sup>7</sup>

If a portability election was made, the statute of limitations remains open on the first spouse's estate. However, this tolling is limited, as the first deceased spouse's Form 706 may be re-examined solely to review the calculation of DSUE.<sup>8</sup> The IRS has authority to re-examine the DSUE even if the IRS has issued an estate tax closing letter. However, because the re-examination is limited, executors should not be deterred from filing Form 706 to elect portability.

Many executors have failed to timely elect portability, resulting in the loss of increased federal gift and estate tax exemption. The IRS received numerous private letter ruling requests for an extension of time to elect portability. In some requests, the executor was unaware of the need to file Form 706 to make the election. In other requests, the executor of the surviving spouse's estate discovered that a portability election was never made.<sup>9</sup> The IRS recognized a need for continued relief and issued Revenue Procedure 2017-34 to provide guidance.

### Extensions

Revenue Procedure 2017-34 provides a simplified method to obtain an extension of time to file Form 706 and elect portability. Relief is available for estates of decedents who died after December 31, 2010 and were survived by a spouse. The decedent must have been either a citizen or resident of the United States on the date of his or her death.

Relief is only available for estates not required to file Form 706. Form 706 is not required if the value of the gross estate, plus adjusted taxable gifts, did not exceed the federal estate tax exemption.<sup>10</sup> However, due to the present exemption levels, portability and relief under Revenue Procedure 2017-34 should be available to many estates. It is important to look at asset valuation and titling. For example, even a large estate where assets are held jointly between spouses may take advantage of Revenue Procedure 2017-34, as only one-half of the value of such assets are included in the first spouse's gross estate.<sup>11</sup>

Executors are also permitted to opt out of portability on Form 706. If an executor filed a timely Form 706 and elected out of portability, the extension under the Revenue Procedure is not available.<sup>12</sup>

### Filing Form 706

If an estate is eligible for relief, the executor must file a complete and properly prepared Form 706 on or before the later of January 2, 2018 or the second anniversary of the decedent's death. Additionally, the executor must state the following on the top of page one of Form 706: "FILED PURSUANT TO REV. PROC. 2017-34 TO ELECT PORTABILITY UNDER § 2010(c)(5)(A)."

Now that January 2, 2018 has passed, there are only two ways for an executor to take advantage of Revenue Procedure 2017-34. If filing will occur on or within the two-year anniversary of the decedent's death, the Revenue Procedure must



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be used.<sup>13</sup> If filing will occur after such two-year anniversary, the executor must request a private letter ruling.<sup>14</sup> Again, relief is only available if Form 706 was not required to be filed based upon the size of the gross estate.

### New York State Estate Tax

In addition to the federal estate tax, there is a New York State estate tax applicable to New York resident decedents and non-residents having property located in New York State. The current New York estate tax exemption is \$5,250,000.<sup>15</sup> New York does not follow the federal rules, and does not allow portability of any New York estate tax exemption.

On January 1, 2019, the New York estate tax exemption is scheduled to match the federal amount.<sup>16</sup> It is unclear at this time whether New York will amend its estate tax law to the new increased \$10,000,000 federal estate tax exemption, as amended by the TCJA. The estate tax portion of the New York Tax Law refers to the IRC with all amendments enacted on or before January 1, 2014.<sup>17</sup> As such, beginning January 1, 2019, the New York estate tax exemption will likely track the prior federal exemption at \$5,000,000, adjusted for inflation.

Portability is a valuable tool for married couples to take advantage of the maximum federal estate and gift tax exemption. The increased exemptions provide meaningful relief for many clients. Executors of smaller estates must also fully consider the benefits of making a timely portability election. Similarly, attorneys representing executors must fully communicate the benefits of portability to their clients. Attorneys should also review estate plans and trusts in light of the TCJA.

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1 I.R.C. § 2010(c).

2 Tax Cuts and Jobs Act § 11061(a).

3 I.R.C. § 2001(a); I.R.C. § 2010(a).

4 I.R.C. § 2010(c)(5).

5 Treas. Reg. § 2010-2(a)(7)(ii).

6 I.R.C. § 2203.

7 Treas. Reg. § 20.6075-1.

8 *Estate of Sower v. Comm'r*, 149 T.C. 11 (2017).

9 Revenue Procedure 2017-34 § 2.02(4).

10 Revenue Procedure 2017-34 § 3.01.

11 I.R.C. § 2040(b).

12 Revenue Procedure 2017-34 § 3.02.

13 Revenue Procedure 2017-34 § 7.02.

14 Revenue Procedure 2017-34 § 2.02(6).

15 New York Technical Memorandum TSB-M-14(6)M.

16 *Id.*

17 Tax Law § 951(a).