

IRS Simplifies Late Portability Election

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On Friday, June 9, 2017, the Internal Revenue Service issued Revenue Procedure 2017-34, which permits certain estates to make a late portability election if they previously failed to make a timely election. In its simplest form, if a deceased spouse has not fully utilized his or her Federal Estate Tax exemption, the unused portion, known as the “Deceased Spousal Unused Exemption” or “DSUE”, may be transferred, or “ported,” to the surviving spouse. Thereafter, for estate and gift tax purposes, the surviving spouse’s Federal Estate Tax exemption is the sum of (i) his/her own exemption, plus (ii) the deceased spouse’s ported DSUE amount. As a result, because of portability, a surviving spouse is able to double the amount that he/she can leave to the heir’s estate—tax-free to approximately \$11 million.

Prior to the legislation permitting portability, if the first spouse were to die without utilizing his or her Federal Estate Tax exemption, the exemption would be unavailable to the surviving spouse and it would have been wasted. However, a Federal Estate Tax Return (Form 706) must be filed in a timely manner in order to elect portability. Prior to Revenue Procedure 2017-34, an estate that failed to file a Federal Estate Tax Return (Form 706) either lost the ability to make the election or was required to submit a request for a Private Letter Ruling with the IRS, which is both expensive and time consuming.

As a result of Revenue Procedure 2017-34, taxpayers now have a simplified method to obtain an extension of time to elect portability. If the decedent’s estate did not initially have a federal filing requirement, in order to qualify for the simplified late election, an executor must file a complete and properly prepared Federal Estate Tax Return (Form 706), on or before the later of January 2, 2018 or the second anniversary of the decedent’s date of death. This means that going forward, under the new rules, executors have 2 years from the date of the first spouse’s death, instead of just 9 months, to file an estate tax return to elect portability. In addition, until January 1, 2018, for anyone who had died from January 1, 2011 through January 2, 2016 (and who was not otherwise required to file an estate tax return and missed the deadline for timely filing), an executor can now file a return to obtain the DSUE. If an executor failed to make the portability election, a late portability filing could potentially

save more than \$2 million in estate taxes following the surviving spouse's death.

If you have not made a portability election and/or have questions regarding whether portability applies to you, please feel free to reach out to our firm's Trusts and Estates/Taxation Practice Group to discuss your options.