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Estate Tax Return Filing Requirements for Portability

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Note that the IRS has recently reiterated a crucial facet of the principle of “portability” under existing federal estate tax laws.

You will recall that “portability” permits a surviving spouse to claim the unused portion of the predeceased spouse’s estate tax exclusion amount together with and in addition to the surviving spouse’s own basic exclusion amount. By applying portability, upon the subsequent death of a surviving spouse, the surviving spouse can substantially increase the available shelter from federal estate tax by also claiming the unused portion of the predeceased spouse’s exclusion amount (currently \$5,340,000).

So, if the predeceased spouse does not use all of the available estate tax exclusion (often because many or most assets have been held jointly and/or left to the surviving spouse and qualify for the unlimited marital deduction), the surviving spouse can substantially step-up the available estate tax exclusion upon the subsequent death of the surviving spouse.

However, the only way to claim this stepped-up tax benefit at all is for the executor of the predeceased spouse to make a timely irrevocable election to permit the surviving spouse to claim the unused exclusion amount – a so-called “portability election.”

The IRS has restated its firm position that the exclusive method for making the portability election is the timely filing of a federal estate tax return (Form 706) on behalf of the predeceased spouse within 9 months (plus any extension) after the death of the predeceased spouse – even if the estate of the predeceased spouse would not have otherwise been required to file an estate tax return at all. Thus, even though the estate of a decedent with a gross estate valued well below the applicable \$5,340,000 exclusion amount would not be required to file (and would normally refrain from filing) a federal estate tax return at all, IRS requires that such a federal estate tax return must be filed by the executor of the predeceased spouse for no other reason than to make a portability election and permit the surviving spouse to claim the unused portion of the decedent’s exclusion amount.

To reduce the burden of this single purpose return filing requirement, however, the estate of a predeceased spouse filing a federal estate tax return only for the purpose of electing portability for the surviving spouse will be excused from establishing and reporting the value of all those assets qualifying for the marital deduction (property

inherited by the surviving spouse) and qualifying for the charitable deduction (property donated to charity). Instead, so long as it is established that the estate is entitled to claim the marital and/or charitable deductions, the new rules only require the estate to make a good faith best estimate of the value of the entire estate (within prescribed dollar ranges, rounded to the nearest \$250,000). Consequently, the task of preparing and filing an estate tax return for the simple purpose of electing portability has been significantly simplified.

Because so many estates have made the mistake of refraining from filing an estate tax return to claim the portability election, the IRS has allowed an extension for the estates of decedents dying in 2011, 2012 and 2013 to file a late Form 706 return to claim the portability election. The late Form 706 estate tax return and its election to permit portability must be filed no later than December 31, 2014.