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Save millions with estate tax return

On Jan 27 of this year, the IRS announced in Revenue Procedure 2014-18 an automatic extension of time for certain estates to elect portability of a decedent's unused exclusion amount for the benefit of the decedent's surviving spouse.

This is an important development which can translate into millions of dollars of estate tax savings. Specifically, any surviving spouse (including those in same-sex marriages) can capture a late spouse's unused estate tax exemption.

What is portability?

Prior to 2011, if a married individual's assets were less than the exclusion amount, upon death such excess amount was lost. In 2011, legislation allowing for portability became effective under the American Taxpayer Relief Act of 2012 (ATRA), effective Jan. 2, 2013. ATRA fixed the federal estate tax, lifetime gift and generation-skipping transfer exemptions at \$5 million, adjusted for inflation after 2011. ATRA also increased the maximum estate, gift and generation-skipping transfer tax rate at the federal level to 40 percent.

With portability, the estate of a married taxpayer can pass along the unused part of their exclusion amount to a surviving spouse (up to \$5 million), thereby providing the survivor with a larger exclusion amount. If the surviving spouse gets remarried, the exclusion amount available would be limited to the lesser of \$5 million or the unused exclusion of the last deceased spouse. However, portability is not applicable at the state level, so clients are encouraged to make certain their estate plan properly allows for maximum

wealth transfer in light of the state estate tax regimen.

The estate tax exemptions and top estate tax rates were as follows, as adjusted for inflation:

- 2011: \$5,000,000 — 35 percent
- 2012: \$5,120,000 — 35 percent
- 2103: \$5,250,000 — 40 percent
- 2014: \$5,340,000 — 40 percent

The value of portability is best illustrated with an example.

After a long struggle with Alzheimer's, Barry died in 2013 and was survived by his wife, Fran. Barry did not have a taxable gross estate at the time of his death. However, Barry had a significant retirement plan which passed directly to Fran.

Now, Fran's taxable gross estate exceeded \$5.34 million and was expected to increase. By timely filing an estate tax return for Barry's estate, we were able to capture \$4.1 million of Barry's unused exemption. Upon Fran's death, in addition to her estate tax exclusions, she will also be able to pass an additional \$4.1 million estate tax free to her children, potentially saving \$1.64 million in federal estate tax.

How to capture portability?

Importantly, the deceased spousal exclusion amount is only available to the surviving spouse if an election is made on a timely filed estate tax return. By regulation, to make a portability election, the estate tax return must be filed within nine months of death, unless a sixth month extension is requested pursuant to regulation Section 301.9100-3. The IRS may grant an extension of time to make an election whose due date is not prescribed by statute (often referred to as "9100 relief").

The federal estate tax return is the only way to take advantage of the portability election. Before

THE BUZZ



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Revenue Procedure 2014-18, if an executor failed to timely file Form 706 to elect portability, the surviving spouse lost the right to her deceased spouse's unused exemption. With the top federal estate tax rate at 40 percent and the exclusion amount now over \$5 million, the estate tax cost of this missed filing could exceed \$2 million.

Extension to file under Revenue Procedure 2014-18

Now, with the IRS' recent ruling, a surviving spouse or executor of an estate is automatically granted an extension to elect portability if certain requirements are met. To qualify for relief under Revenue Procedure 2014-18:

- The decedent must have (a) died after Dec. 31, 2010, and on or before Dec. 31, 2013, (b) been survived by a spouse; and (c) been a resident or citizen of the

United States at death;

- The estate was not required to file an estate tax return under IRC Section 6018(a);
- The estate tax return was not timely filed;
- An estate tax return is filed on or before Dec. 31, 2014; and
- The return must state at the top of the Form 706 "Filed Pursuant to Rev. Proc. 2014-18 to Elect Portability Under Code Section 2010(c)(5)(a)."

What does this mean for same-sex marriages?

Revenue Procedure 2014-18 offers significant relief to those taxpayers who missed the filing deadline and those who were not otherwise required to file a tax return, such as same-sex married couples. Only after the U.S. Supreme Court's groundbreaking decision in *United States v. Windsor* and Revenue Ruling 2013-17 was a portability election available to same-sex married couples. Accordingly, Revenue Procedure 2014-18 allows a surviving spouse of a same-sex couple to take advantage of the missed opportunity to elect portability for a spouse who died before Section 3 of the Defense of Marriage Act was ruled unconstitutional.

Unfortunately, not all surviving spouses received the same valuable counsel as Fran, and those in same sex marriages were not previously eligible to file an estate tax return.

Revenue Procedure 2014-18 allows for surviving a spouse to rectify this oversight and capture the valuable benefits of portability, potentially saving millions of dollars on the surviving spouse's death.

Thanks to Chuhak & Tecson P.C. law clerk Jamie Levin for her contribution to this month's column.