
IRS Grants Simplified Relief for Surviving Spouses Making Late Portability Elections

BLOG | JUNE 13, 2017

On June 9, 2017, the IRS released Revenue Procedure 2017-34 (the “2017 Rev. Proc.”) which sets forth a simplified method for surviving spouses to make a “portability” election to take advantage of a deceased spouse’s unused estate and gift tax exclusion amount (“DSUE”). The Rev. Proc. allows executors of estates of decedent’s dying after December 31, 2010 to make the portability election without having to go through the cumbersome, not to mention expensive, process of obtaining a private letter ruling under Treasury Regulation § 301.9100-3 (“9100 Relief”).

For purposes of Federal estate and gift taxes, a portability election makes the DSUE available for application to the surviving spouse’s subsequent gratuitous transfers during life or at death. Beginning in 2011 with the adoption of the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 (the “2010 Tax Act”), the applicable exclusion amount available for lifetime gifts and death transfers by individuals was \$5,000,000 and indexed annually for inflation (currently \$5,490,000.00 for 2017), and the exclusion amount was “portable” to a decedent’s surviving spouse to the extent the exclusion amount was unused at death.

The increased exclusion amount and portability provisions of the 2010 Tax Act were made permanent by the American Taxpayer Relief Act of 2012 (the “2012 Tax Act”) as a part of the negotiations between Congress and then President Obama to avoid to the so-called “fiscal cliff.”

Under the 2010 and 2012 Tax Acts, in order to take advantage of the portability of the exclusion amount, the executor of the decedent’s estate is required to file a Federal estate tax return, which is generally due within nine (9) months of death, to make the portability election. However, Federal estate tax returns are only required for estates in excess of the exclusion amount, and due to the size of the exclusion amount of \$5,000,000 plus inflation adjustments, many estates are no longer required to file an estate tax return. This left many executors uncertain as to whether they should file a Federal estate tax return even if only for making the portability election, and many estates failed to make the filing which caused the loss of portability by the surviving spouse.

Addressing this uncertainty, the IRS issued Revenue Procedure 2014-18 in February 2014 (the 2-14 Rev. Proc.) that permitted the late filing of Federal estate tax returns for decedents dying after December 31, 2010, through December 31, 2014. After December 31, 2014, the only way to make a late portability election was through 9100 Relief which required the payment of a user fee (currently \$9,800) to the IRS in addition to the costs of preparing the relief request.

Even with the 2014 Rev. Proc. many estates still were unaware of the filing requirement. The 2017 Rev. Proc. cites that the IRS has received numerous requests for 9100 Relief since December 2014 to permit portability elections stemming from executors either unaware of the filing requirement or unaware of the failure to make the portability election until several years later. This large number of requests has prompted the issuance of the 2017 Rev. Proc.

The 2017 Rev. Proc. permits estates of US citizens and residents that died after December 31, 2010, who were survived by a spouse and not otherwise required to file an estate tax return, to file a late estate tax return for the purpose of making the portability election and transferring the DSUE to the surviving spouse on or before the later of (i) January 2, 2018 or (ii) the second anniversary of the decedent's death. If the estate tax return is filed before the deadline the return will be deemed timely filed, and no further action is necessary by the estate. No request for 9100 Relief (including the \$9,800 user fee payable to the IRS) will be necessary if the filing is made in compliance with the 2017 Rev. Proc.

If an estate has filed a request for 9100 Relief for an extension of time to file an estate tax return for the purpose of electing portability and the request was pending as of June 9, 2017, the IRS will close the file and issue a refund of the user fee, and the executor may pursue the requested relief as set out in the 2017 Rev. Proc. While the 2017 Rev. Proc. does not specify, if the IRS previously granted the 9100 Relief, it does not appear that those estates will receive a refund of the user fee.

The portability election is a simplified and effective post-mortem tool that surviving spouses may employ to allow full use of both spouses' exclusion amounts and potentially result in significant estate tax savings even if sophisticated estate planning was not undertaken by the deceased spouse. Surviving spouses whose spouse passed away after December 31, 2010 and are unsure of whether you have taken advantage of the portability should seriously consider taking advantage of the simplified and cost effective relief granted by the IRS.

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