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Second chance for portability election

In a rare circumstance, the IRS earlier this year announced an automatic extension of time for certain taxpayers to obtain a tax break potentially worth millions of dollars. The matter concerns the election of portability of the federal estate tax exemption by a surviving spouse, which has only been available since January 2011. Estate planners—and the general public!—are still getting used to the new concept. The idea is that a married couple should have a double estate tax exemption, and they should *not* need a fancy trust plan to get it. But they can't just take it for granted. To obtain what's called a Deceased Spouse's Unused Exemption, or DSUE, an estate tax return must be filed for the first spouse to die, even though no estate tax will be due. The IRS has to be notified of the value of the DSUE.

The IRS described the following situation. Spouse 1 died on January 1, 2011, survived by Spouse 2. Spouse 1's estate consisted of \$2 million in joint bank accounts with Spouse 2. No estate tax return was required for Spouse 1, and none was filed. That inherently means that Spouse 1's estate did not make a DSUE election. Next Spouse 2 dies on January 14, 2011, with a taxable estate of \$8 million. An estate tax return is filed, and taxes are paid on the \$3 million in excess of the exclusion from federal estate tax. However, if the DSUE election had been made for Spouse 1, no estate tax would have been due.

Under the IRS announcement, Spouse 1's executor has an extension of time to file the DSUE election, which will get Spouse 2's estate a full refund of taxes. The reason for the surprising generosity of the IRS is the *Windsor* decision in 2013, mandating that same-sex married couples be eligible for the marital deduction from federal estate taxes. That means that they are eligible for the DSUE election as well, though they couldn't know that in 2011. Although that may motivate the new policy, the tax relief is not limited to same-sex married couples. The extension of time is available for any decedents who:

- had a surviving spouse;
- died after December 31, 2010, and on or before December 31, 2013;
- had an estate small enough so that no estate tax return was required; and
- did not have an estate tax return filed.

If you might be in this situation, talk to your estate planning advisors soon, before time runs out. To recover estate taxes paid, a claim for credit or refund must be filed by October 14, 2014, even if the DSUE election hasn't been made by then.

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