

**Steve Leimberg's Estate Planning  
Email Newsletter Archive Message #2569**

**Date:20-Jul-17**

**Subject: Mike Jones on Revenue Procedure 2017-34 - IRS Grants Extension of Time to File Estate Tax Return Claiming Deceased Spouse's Unused Exclusion Amount in Certain Circumstances**

*"The better practice is to make portability elections on a timely filed estate tax return. But, where the election was missed, taking advantage of relief available under this Revenue Procedure will avoid the cost and delay of seeking a private letter ruling. Practitioners should note that, while Rev. Proc. 2017-34 provides relief, it should not be viewed as establishing "best practices." Therefore, practitioners are urged to timely file estate tax returns to make portability elections for all estates when the election may be desired and to view relief of any kind only as a last resort."*

We close the week with **Mike Jones'** commentary on [Revenue Procedure 2017-34](#). Mike would like to thank **Keith Schiller** for his insights, editing and comments.

**Michael J. Jones, CPA** is a partner in Monterey, California's **Thompson Jones LLP** ([www.thompsonjones.com](http://www.thompsonjones.com)). His tax consulting practice focuses on tax-efficient wealth transfer strategy, trust and probate tax matters (both administration and controversy resolution), and family business transitions. Mike is the author of four books, including *Inheriting an IRA* and *Inheriting an IRA Professional Edition*. He has written over 150 articles published in *Trusts & Estates*, *Leimberg Information Services, Inc.*, *Ed Slott's IRA Newsletter* and elsewhere. He serves as chair of *Trusts & Estates* magazine's Retirement Benefits Committee and the CPE Forum of the Central Coast. He has lectured across the U.S. for Jerry A. Kasner Estate Planning Symposium; Southern California Tax & Estate Planning Forum, Hawaii Tax Institute, AICPA Advanced Estate Planning Conference, AICPA Conference on Tax Strategies for the High-Income Individual, UCLA-CEB Estate Planning Institute, New York University Institute on Federal Taxation, CEB Estate Planning and Administration Annual Updates panels, and others. He has been quoted in Natalie Choate's *Life and Death Planning for Retirement Benefits*, Keith Schiller's *Estate Planning At The*

Movies® — Art of the Estate Tax Return, New York Times, Forbes Magazine, The Wall Street Journal, Bloomberg Financial Report and others.

Here is his commentary:

## **EXECUTIVE SUMMARY:**

A deceased spouse's unused estate tax exclusion amount can be a valuable asset to the decedent's surviving spouse.

For example, if a spouse who has made no lifetime taxable gifts dies during 2017 leaving a taxable estate of \$1,540,000, the executor of that estate may elect to port the decedent's estate's unused Applicable Exclusion Amount of \$4,050,000 to the surviving spouse (the first deceased spouse's estate's Basic Exclusion Amount of \$5,490,000, minus the first deceased spouse's taxable estate of \$1,540,000).

The surviving spouse may then transfer, either by gift or upon death, without having to pay gift or estate taxes, the predeceased spouse's unused exclusion amount (DSUE) of \$3,950,000, plus the surviving spouse's own basic exclusion amount (\$5,490,000 in 2017). Because of portability, the couple may together make taxable transfers during 2017 totaling up to \$10,980,000, no matter what portion of that amount the first deceased spouse has used up during lifetime or at death. The surviving spouse may also make tax-free gifts in future years of the annual inflation increase that applies to the Basic Exclusion Amount of the surviving spouse plus the DSUE from this last-deceased spouse (in addition to annual exclusion gifts). The DSUE does not adjust with inflation.

In cases where an estate tax return is required (because the filing threshold is met), a timely filed estate tax return (including a return filed under a valid extension) is mandatory to port DSUE to the surviving spouse.

In cases where an estate tax return is not required (because the filing threshold wasn't met), that golden opportunity should not be missed. But, if a timely non-required return making a DSUE election wasn't filed, there may still be hope to make a portability election, without having to file a private letter ruling request. That's where Revenue Procedure 2017-34 comes in.

## **FACTS:**

The federal estate tax allows each decedent's estate a credit based on the Applicable Exclusion Amount ("AEA"). For the estate of a surviving spouse, the AEA is the sum of the basic exclusion amount and the deceased spouse's unused exclusion (DSUE) amount (if any). When the taxable estate doesn't exceed the decedent's available AEA, the credit eradicates the tax.

The basic exclusion amount is \$5,000,000 for estates of decedents dying during calendar year 2011. That amount is adjusted for inflation after 2011. For estates of decedents dying during 2017, the basic exclusion amount is \$5,490,000. That basic exclusion amount produces an estate tax credit amount of \$2,141,800. Estate taxes are generally owed only if the amount of the decedent's taxable estate exceeds the AEA available to the estate. If a decedent was preceded in death by her spouse, the decedent's AEA includes the unused basic exclusion amount of the predeceased spouse – but only if the first decedent's executor elects to port that decedent's unused exclusion amount to the surviving spouse. However, the ported amount is not thereafter increased for inflation (i.e., cost of living adjustments), even though the surviving spouse's basic exclusion amount is so adjusted.

Special rules apply in the computation of the AEA when the surviving spouse was predeceased by prior spouses who ported DSUE amounts to the surviving spouse. Basically, the surviving spouse may, at any time, use DSUE amounts but only from the last deceased spouse at any given time. The fortuitous widow(er) may, therefore, receive and use DSUE amounts from many prior spouses as long as the order of death and the making of gifts is sequenced to maximize the use of DSUE amounts from the last deceased spouse.

### **Estate Tax Return**

An estate tax return must be filed in order to elect to port a DSUE amount to a surviving spouse. Estates falling below the filing threshold (i.e., the basic exclusion amount exceeds the taxable estate) are nevertheless required to file a return in order to make a portability election (i.e., to port DSUE). But, the statutory due date for estate tax returns under Code section 6018(a) applies only to returns required to be filed (i.e., gross

estates plus adjusted taxable estates exceeding the basic exclusion amount). Code section 2010(c)(5)(A) requires the making of a portability election within the time prescribed by law for filing estate tax returns. However, that reference is ambiguous since Code section 6018(a) includes the foregoing value requirement. Many portability elections are desired for estates beneath that threshold. This uncertainty was clarified by Treasury Regulations section 20.2010-2, which provides such returns generally have the same due date as returns required to be filed.

The key consequence arising from the regulatory clarification of the due date that applies to estates falling below the filing threshold is that the the IRS may grant relief to make a portability election on an otherwise late estate tax return. The IRS does not have such leeway when the return is mandatory.

Thus, relief may be available if the return due date is missed for estates falling under the filing requirement. IRS has authority to grant an extension to file and elect portability under Treasury Regulations sections 301.9100-1 through 301.9100-3 (“9100 relief”). The executor (including an executor for estate tax purposes only) may seek 9100 relief by filing a request for private letter ruling.

### **Revenue Procedure 2017-34 Automatic Extension**

[Revenue Procedure 2017-34](#) addresses the backlog concern of the IRS which should help tax preparers, but avoid abuse that could otherwise arise from even a broader grant of relief. Therefore, Rev. Proc. 2017-34 grants, only in certain cases, an automatic extension of time to file an estate tax return that doesn’t meet estate tax filing requirements, but in which a DSUE election is desired. The relief under that Revenue Procedure obviates the need to seek 9100 relief and reduces costs for both taxpayers and IRS.

According to Keith Schiller, Esq. (author of Estate Planning at the Movies), about 70 to 100 PLRs are submitted each year requesting 9100 relief to elect DSUE. Keith notes that IRS National Office has been overwhelmed with such requests, recruiting attorneys not normally involved in transfer tax matters. In other words, it’s IRS’s hope that the availability of Rev. Proc. 2017-34 relief will free up considerable time within its National Office -- relief for all concerned.

## **Which Estates Qualify for Relief?**

Only estates that have no filing requirement under IRC § 6018(a) may seek Rev. Proc. 2017-34 relief. Relief is NOT available if an estate tax return was required to be filed under IRC § 6018 (i.e., the decedent was a US citizen or resident whose gross estate at death exceeds the decedent's own basic exclusion amount, without regard to DSUE). Also, relief is NOT available under the new procedure to amend a portability election that has already been made. Lastly, relief is not available under the procedure for estates that timely filed an estate tax return. The IRS reasons that an estate that timely filed a return either elected out of the portability election (by checking the box on page 4 to opt out) or affirmatively made the election.

Only an executor, as defined in Regs. § 20.2010-2(a)(6), may apply for relief. For example, the decedent's surviving spouse may not apply for relief (unless the surviving spouse is an executor under IRC § 2203). "Executor" includes "only the executor or administrator of the decedent, or, if there is no executor or administrator appointed, qualified, and acting within the United States, then any person in actual or constructive possession of any property of the decedent."

## **Deadline**

Until January 2, 2018, relief is available for any estate tax return filed on before that date.

After January 2, 2018, Rev. Proc. 2017-34 relief is available until the second anniversary of the decedent's date of death.

Here's how the Revenue Procedure says that:

[T]his revenue procedure provides a simplified method to obtain an extension of time to elect portability that is available to the estates of decedents having no filing requirement under § 6018(a) for a period the last day of which is the later of January 2, 2018, or the second anniversary of the decedent's date of death.

## **Effect of Claiming Relief**

Once the Rev. Proc. 2017-34 relief is properly claimed, the requirements of Regulations Section 301.9100-1 through 301.9100-3 are deemed to have been satisfied, and relief is deemed to have been granted. Subsequently, the surviving spouse or the estate of the surviving spouse may utilize the predeceased spouse's DSUE.

### **Filing Under Revenue Procedure 2017-34**

A complete and properly prepared return must be filed, and the rules of the DSUE regulations must be followed. Where DUSE is elected, a return that excludes marital deduction items enumerated in Regulations § 20.2010-2(a)(7)(ii) will nevertheless constitute a complete and properly prepared return for purposes of the Rev. Proc.

The unusual step of including the following legend at the top of Form 706 is required to qualify for the Rev. Proc.'s. relief:

FILED PURSUANT TO REV. PROC. 2017-34 TO ELECT  
PORTABILITY UNDER § 2010(c)(5)(A).

### **Effect on 9100 Relief**

The Rev. Proc. specifically states IRS will not accept a request for private letter ruling seeking relief under Regulations Section 301.9100-3 when Rev. Proc. 2017-34 relief can be claimed. In all cases where relief is properly claimed under Rev. Proc. 2017-34, Regulations Section 301.9100-3 requirements are deemed satisfied. Practitioners who had private letter ruling applications pending on June 9, 2017, seeking relief for estates under the filing requirement that otherwise satisfy Rev. Proc. 2017-34 will be contacted by the IRS that the ruling request is dismissed and that the user fee will be refunded. Keith Schiller reports that IRS Counsel recommends that a copy of the letter from the IRS informing the taxpayer of the foregoing IRS action be attached to the estate tax return filed under Rev. Proc. 2017-34.

### **9100 Relief Still Available in Other Cases**

On the other hand, if Rev. Proc. 2017-34 relief isn't available because any of its requirements isn't met, relief may nevertheless be sought under

Regulations Section 301.9100-1 through 301.9100-3 upon application for a private letter ruling.

## **Statute of Limitations; Refund Claims**

What happens if a late portability election is made that is recognized under Rev. Proc. 2017-34, the election results in an overpayment of gift or estate tax, but the statute of limitations has run on the time to file a claim for refund? The revenue procedure points out that, although the time for making a portability election may have been extended (under the provisions of the revenue procedure), the statute of limitations on claiming a refund has nevertheless run. In other words, the revenue procedure does not, in any case, extend the statute of limitations applicable to claiming a refund.

However, Examples 1 and 2 of the revenue procedure confirm that a timely filed protective claim for refund (Form PC) can extend the statute of limitations, even if that claim is filed before the time when the DSUE election itself occurs. Such a claim may be filed either by the surviving spouse or by the estate of the surviving spouse in anticipation of a Form 706 being filed on behalf of the predeceased spouse to elect portability pursuant to Rev. Proc. 2017-34. Note that a surviving spouse's filing of Form PC does not, by itself, make the surviving spouse an "executor" who may elect portability on behalf of the predeceased spouse's estate.

Example 3 points out that the election to port DSUE must be filed *before* the surviving spouse makes a lifetime gift that will utilize DSUE. Thus, when the surviving spouse makes gifts in excess of the surviving spouse's own AEA, but the DSUE election is made after the gifts were made, DSUE won't be available to shelter those gifts from gift taxes. In other words, portability can't be used by a surviving spouse until portability has actually been elected by the estate of the first deceased spouse. That's logical: there's no DSUE available to the surviving spouse until the DSUE election is, in fact, made.

## **Conclusion**

The better practice is to make portability elections on a timely filed estate tax return. But, where the election was missed, taking advantage of relief available under this Revenue Procedure will avoid the cost and delay of

seeking a private letter ruling. Practitioners should note that, while Rev. Proc. 2017-34 provides relief, it should not be viewed as establishing “best practices.” Therefore, practitioners are urged to timely file estate tax returns to make portability elections for all estates when the election may be desired and to view relief of any kind only as a last resort.

**HOPE THIS HELPS YOU HELP OTHERS MAKE A *POSITIVE* DIFFERENCE!**

*Mike Jones*

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**CITES:**

[Rev. Proc. 2017-34](#), 2017-26 I.R.B. 1282 (6/26/17); Internal Revenue Code Sections 2010, 6501; Treasury Regulations sections 20.2010-1 through 20.2010-3; 301.9100-1 through 301.9100-3