

***PORTABILITY OF THE FEDERAL ESTATE
TAX EXEMPTION AFTER THE TEMPORARY
REGULATIONS***

Wednesday, December 19, 2012

68th Semi-Annual Tax and Estate Planning Forum

**The Hilton
East Brunswick, New Jersey**

Presented by:

Bruce E. Mantell, C.P.A., Esq., LL.M.

**MANTELL, PRINCE & REYNOLDS, P.C.
Mountain Heights Center at Berkeley Heights
430 Mountain Avenue, Suite 113
Murray Hill, New Jersey 07974
908-464-5900
FAX: 908-464-5901
e-mail: bmantell@mantell-prince.com
www.mantell-prince.com**

PORTABILITY OF THE FEDERAL ESTATE TAX EXEMPTION AFTER THE TEMPORARY REGULATIONS

Presented by: Bruce E. Mantell, CPA, Esq., LL.M.

IT IS POSSIBLE THAT THIS OUTLINE WILL BE OBSOLETE IN WHOLE OR IN PART ON OR BEFORE THE DATE OF THIS PRESENTATION AS A RESULT OF ESTATE AND GIFT TAX LAW CHANGES PASSED BY THE U.S. HOUSE OF REPRESENTATIVES AND SENATE AND SIGNED BY PRESIDENT OBAMA.

- I. Portability
 - A. Surviving spouse can use unused exemption of “last deceased spouse” for estate and gift tax purposes
 - B. Surviving spouse gets (a) basic exclusion amount, plus (b) deceased spouse unused exclusion amount (DSUEA)
 - C. Portability does not apply for generation skipping tax purposes
 - D. Joint Committee Examples
 - 1. **Example 1.** Assume that Husband 1 dies in 2011, having made taxable transfers of \$3 million and having no taxable estate. An election is made on Husband 1’s estate tax return to permit Wife to use Husband 1’s deceased spousal unused exclusion amount. As of Husband 1’s death, Wife has made no taxable gifts. Thereafter, Wife’s applicable exclusion amount is \$7 million (her \$5 million basic exclusion amount plus \$2 million deceased spousal unused exclusion amount from Husband 1), which she may use for lifetime gifts or for transfers at death
 - 2. **Example 2.** Assume the same facts as in Example 1, except that Wife subsequently marries Husband 2. Husband 2 also predeceases Wife, having made \$4 million in taxable transfers and having no taxable estate. An election is made on Husband 2’s estate tax return to permit Wife to use Husband 2’s deceased spousal unused exclusion amount. Although the combined amount of unused exclusion of Husband 1 and Husband 2 is \$3 million (\$2 million for Husband 1 and \$1 million for Husband 2), only Husband 2’s \$1 million unused exclusion is available for use by Wife, because the deceased spousal unused exclusion amount is limited to the lesser of the basic exclusion amount (\$5 million) or the unused exclusion of the last deceased spouse of the surviving spouse (here, Husband 2’s \$1 million unused exclusion). Thereafter, Wife’s applicable exclusion amount is \$6 million (her \$5 million basic exclusion amount plus \$1 million deceased

spousal unused exclusion amount from Husband 2), which she may use for lifetime gifts or for transfers at death

- E. The IRS issued Temporary Regulations regarding the Portability Election on June 18, 2012
 - 1. The Election
 - a. Executors must timely file Form 706 even if the Estate is not otherwise required to file a Form 706
 - b. For Portability not to apply an affirmative election needs to be made on Form 706. If Form 706 is not required to be filed, the election out of Portability does not have to be made. The decision not to file the Form 706, in and of itself, is an election out
 - c. Complete and properly prepared Form 706 needs to be made
 - i. Executor, however, does not have to report the value of certain property that qualifies for marital or charitable deduction
 - ii. Instead, the property needs be described with an estimated value within ranges
 - 2. Gifting
 - a. Portability applies for gift tax purposes
 - b. The DSUEA is deemed used before the donor's exemption amount
 - 3. Statute of Limitations
 - a. The Statute of Limitations does not expire with respect to a Form 706 with respect to the DSUEA concerning matters relating to the portability election. It does expire with respect to other matters
 - b. Thus, even though IRS may not assess estate tax, if the Statute of Limitations has expired, it could review the Form 706 and re-compute the DSUEA on the surviving spouse's death or at such time that the surviving spouse's Form 709 is examined
 - 4. Draft Form 706 as of August 16, 2012
 - a. The 2012 Form 706 is not yet finalized

- b. Section 6 (Portability of Deceased Spousal Unused Exclusion (DSUE)) has been added to the draft Form 706. See Exhibit A
- F. Only applies to “last deceased spouse”. Remarriage will not remove right to the unused exemption, but if new spouse predeceases, then only that spouse’s unused exemption could be used
- G. Perhaps better to make gifts to use exemption to make sure it is not lost by remarriage and death of new spouse or by a law change
- H. Portability may prove to be very useful if retirement benefits are major asset of the estate
- I. Notwithstanding Portability, creating a Non-Marital Credit Shelter Trust will, more likely than not, provide better planning potential because of the tax shelter of future appreciation
- J. Like most of TRA 2010, Portability sunsets on January 1, 2013. Nevertheless, President Obama’s proposal to re-enact the 2009 estate and gift tax law includes a change which allows Portability to continue. How President Obama’s Portability rules align with the existing Portability rules remain to be seen

EXHIBIT A

Decedent's social security number

Estate of:

Part 6—Portability of Deceased Spousal Unused Exclusion (DSUE)

Portability Election

A decedent with a surviving spouse elects portability of the deceased spousal unused exclusion (DSUE) amount, if any, by completing and timely-filing this return. No further action is required to elect portability of the DSUE amount to allow the surviving spouse to use the decedent's DSUE amount.

Section A. Opting Out of Portability

The estate of a decedent with a surviving spouse may opt out of electing portability of the DSUE amount. Check here and do not complete Sections B and C of Part 6 only if the estate opts **NOT** to elect portability of the DSUE amount.

Section B. QDOT

Yes	No
-----	----

Are any assets of the estate being transferred to a qualified domestic trust (QDOT)?

If "Yes," the DSUE amount portable to a surviving spouse (calculated in Section C, below) is preliminary and shall be redetermined at the time of the final distribution or other taxable event imposing estate tax under section 2056A. See instructions for more details.

Section C. DSUE Amount Portable to the Surviving Spouse (To be completed by the estate of a decedent making a portability election.)

Complete the following calculation to determine the DSUE amount that can be transferred to the surviving spouse.

1	Enter amount from line 9c, Part 2—Tax Computation	1		
2	Enter amount from line 7, Part 2—Tax Computation	2		
3	Divide amount on line 2 by 35% (0.35). (do not enter less than zero)	3		
4	Add lines 1 and 3	4		
5	Enter the amount from line 5, Part 2—Tax Computation	5		
6	Subtract line 5 from line 4 (do not enter less than zero)	6		
7	DSUE amount portable to the surviving spouse (Enter the lesser of line 6 or line 9a, Part 2—Tax Computation)	7		

Section D. DSUE Amount Received from Predeceased Spouse(s) (To be completed by the estate of a deceased surviving spouse with DSUE amount from predeceased spouse(s))

Provide the following information to determine the DSUE amount received from deceased spouses.

A Name of Deceased Spouse (dates of death after December 31, 2010, only)	B Date of Death (enter as mm/dd/yy)	C Portability Election Made?		D If "Yes," DSUE Amount Received from Spouse	E DSUE Amount Applied by Decedent to Lifetime Gifts	F Year of Form 709 Reporting Use of DSUE Amount Listed in col E	G Remaining DSUE Amount, if any (subtract col. E from col. D)
		Yes	No				
Part 1 — DSUE RECEIVED FROM LAST DECEASED SPOUSE							
Part 2 — DSUE RECEIVED FROM OTHER PREDECEASED SPOUSE(S) AND USED BY DECEDENT							
Total (for all DSUE amounts from predeceased spouse(s) applied)							

Add the amount from Part 1, column D and the total from Part 2, column E. Enter the result on line 9b, Part 2—Tax Computation