

October 21, 2011

CC:PA:LPD:PR (Notice 2011-82)
Room 5203
Internal Revenue Service
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

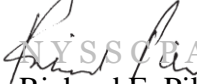
By email: Notice.Comments@irs.counsel.treas.gov

Re: IRS Notice 2011-82, *Guidance on Electing Portability of Deceased Spousal Unused Exclusion Amount*

The New York State Society of Certified Public Accountants, representing more than 28,000 CPAs in public practice, industry, government and education, submits the following recommendations to you regarding the above captioned Notice. NYSSCPA thanks the Internal Revenue Service for the accepting these recommendations and comments.

The NYSSCPA Trust and Estate Administration Committee deliberated the Notice and prepared the attached comments. If you would like additional discussion with us, please contact Ita Rahilly, chair of the Trust and Estate Administration Committee, at (845) 567-9000, or Ernest J. Markezin, NYSSCPA staff, at (212) 719-8303.

Sincerely,


NYSSCPA
Richard E. Piluso
President

Attachment

**NEW YORK STATE SOCIETY OF
CERTIFIED PUBLIC ACCOUNTANTS**

**COMMENTS ON IRS NOTICE 2011-82, *GUIDANCE ON ELECTING
PORTABILITY OF DECEASED SPOUSAL UNUSED EXCLUSION AMOUNT***

October 21, 2011

Principal Drafter

Kevin Matz

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New York State Society of Certified Public Accountants
Comments on IRS Notice 2011-82, *Guidance on Electing Portability of Deceased Spousal Unused Exclusion Amount*

The New York State Society of Certified Public Accountants respectfully submits its comments on Notice 2011-82 (the “Notice”) on the following issues which Treasury and the Internal Revenue Service (the “Service”) have identified for consideration in proposed regulations under section 2010(c) of the Internal Revenue Code (the “Code”):

- The determination in various circumstances of the deceased spousal unused exclusion amount under section 2010(c)(4) (the “DSUEA”) and the applicable exclusion amount under section 2010(c)(2);
- The order in which exclusions are deemed to be used;
- The effect of the last predeceasing spouse limitation described in section 2010(c)(4)(B)(i);
- The scope of the Service’s right to examine a return of the first spouse to die without regard to any period of limitation in section 6501; and
- Any additional issues that should be considered for inclusion in the proposed regulations.

Our primary objective is to propose solutions to eliminate the significant degree of uncertainty that a surviving spouse would otherwise face concerning the use of the DSUEA if he or she were to remarry after the executor of the deceased spouse’s estate has made a portability election under section 2010(c)(5)(A) (a “portability election”).

A. Guidance is Required Where the Wife¹ Remarries After the Death of Husband 1 (For Whom a Portability Election Has Been Made), and Husband 2 Then Dies Without a Portability Election Being Made for Husband 2

A question arises where the Wife remarries after the death of Husband 1 (for whom a portability election has been made), and Husband 2 then dies without a portability election being made for him. What would Wife’s applicable exclusion amount be if the executor of Husband 2’s estate failed to make the portability election on Husband 2’s estate tax return – would Wife then retain the DSUEA of Husband 1, or would she end up with no DSUEA to add to her basic exclusion amount? In order to eliminate uncertainty to the Wife (who could find herself relying on an executor who has his/her own agenda), the failure of Husband 2’s executor to make the portability election should not cause the loss of the DSUEA that the Wife has obtained from Husband 1.

¹ For purposes of illustration, our examples assume that the wife will survive the first husband.

B. The Surviving Spouse Should Be Treated as Using Her DSUEA First Before Using Her Basic Exclusion Amount

Once a surviving spouse inherits her predeceased spouse's DSUEA, the surviving spouse can use the DSUEA to make lifetime gifts. It is unclear, whether, in doing so, the surviving spouse is treated as using her DSUEA first or her basic exclusion amount first. The distinction would be important in the remarriage context where a surviving spouse inherited a DSUEA from her predeceased husband, subsequently made lifetime gifts, and then remarried. If the surviving spouse's second husband subsequently died, a question would arise whether the lifetime gifts she made prior to her remarriage were made using her own basic exclusion amount or the DSUEA she received from her first husband, because section 2010(c)(4)(B) indicates that, upon remarriage, the surviving spouse receives the benefit of the DSUEA only from the last spouse to die. **In order to eliminate uncertainty to the Surviving Spouse in the event of a subsequent remarriage, the surviving spouse should be treated as using her DSUEA first.**

C. Guidance is Needed to Clarify That Neither Estate Tax Nor Gift Tax Can Result Through a "Clawback" of the DSUEA

There is also a potential recapture, or "clawback" issue, with respect to the DSUEA in the context of remarriage. By way of example, if a surviving spouse has an applicable exclusion amount of \$7,000,000 (assume her basic exclusion amount is \$5,000,000 and the DSUEA is \$2,000,000) and she makes lifetime gifts of \$6,000,000 and subsequently remarries, a "clawback" might be possible if her second husband dies with less exclusion available than her first husband, because under section 2010(c)(4)(B) she can receive the DSUEA of only her *last* husband to die. When the surviving spouse subsequently dies, she would not have as much DSUEA as she did when she made the \$6,000,000 in lifetime gifts, which may result in additional estate taxes being due. **In order to eliminate such uncertainty to the surviving spouse, the proposed regulations should clarify that neither estate tax nor gift tax can result through a clawback of the DSUEA.**

D. The Proposed Regulations Should Clarify that the Scope of the Service's Examination of the Estate Tax Return of the First Spouse to Die Is Limited to Determining the Amount of the DSUEA

Under section 2010(c)(5)(B), the Service is authorized to examine a return of the deceased spouse (notwithstanding any period of limitation in section 6501 relevant to Chapters 11 and 12 of the Code—the estate and gift tax provisions respectively) to determine the amount of the DSUEA. We believe it would be helpful if the proposed regulations were to clarify that the scope of such examination without regard to any such period of limitation is expressly limited to issues that directly involve the imposition of tax under Chapter 11 or 12 of the Code. **Accordingly, the proposed regulations should state that the scope of such expansion of the statute of limitations will not apply to income taxes (including to "income in respect of a decedent" under section 691), the generation-skipping transfer tax, or to any other tax imposed by the Code other than under Chapter 11 or 12.**