

October 2013

“DO I REALLY NEED TO FILE A 706?”

Manley & Brautigam does a lot of estate and trust administration work. As a result, we often hear the surviving spouse ask one of the following questions:

Do I really need to go through the complexities and expense of filing a federal estate tax return, Form 706?

My friend told me that because our estate is less than \$5.0 million, we do not need to file an estate tax return – so why are you telling me we should file Form 706?

These are great questions which we enjoy discussing with our clients.

Although fewer estates are now subject to federal estate tax because of the increase of the basic exclusion amount to \$5.250 million (2013), filing a federal estate tax return is still very important on the death of the first spouse.

Starting in 2010, federal estate tax law now allows the “portability” (transfer) of the first spouse’s remaining unused federal estate tax exemption (the “basic exclusion amount”) to go to the surviving spouse, provided that a Form 706 is timely filed.¹ The specifics of “portability” were discussed in our February 2013 newsletter.

Following is a list of the more important reasons that a Form 706 should be filed to elect “portability” on the death of the first spouse:

1. A credit shelter trust (bypass trust) was not included in the decedent’s estate plan.
2. A credit shelter trust is not fully funded (\$5.250 million) on the death of the first spouse.

¹ A federal estate tax return, Form 706, is due 9 months from the decedent’s date of death. The deadline of filing may be extended by 6 months (a total of 15 months from date of death), if an extension is timely filed before the due date.

3. The decedent had *less than* \$5.250 million, but the total combined estate of both spouses is *greater than* \$5.250 million.
4. The total combined estate of both spouses is *less than* \$5.250 million, but the total estate may be *greater than* \$5.250 million by time of the death of the surviving spouse.
5. There is a possibility or expectation that Congress may reduce the basic exclusion amount (\$5.250 million) prior to the death of the surviving spouse – for example the exclusion amount is reduced to \$1.0 or \$2.5 million.²
6. Given the type of assets owned, it might be important to establish a new income tax basis (step-up) on all assets on the death of the surviving spouse.

It is very important to understand that unless the credit shelter trust is fully funded on the death of the first spouse (\$5.250 million), then the first spouse's unused exemption will be lost forever if a Form 706 is not timely filed.

So will a surviving spouse always need to timely file a Form 706? The answer will depend on a number of factors: size of the combined estate; anticipated growth of the surviving spouse's estate; changes in the future estate law; remarriage by the surviving spouse; asset protection planning; and, need for additional income tax basis adjustment on the death of the surviving spouse.

If you would like to discuss with us the applicability or practicality of filing a Form 706, please call us. We are happy to discuss "hypothetical" planning situations with you in complete confidence. We can also provide a mini-planning seminar in your office if that would be helpful.

We hope this has been helpful to you and maybe your clients. If you have questions, please call Peter Brautigam or one of the other great attorneys in our office.

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² It has been reported that President Obama has proposed reducing the current basic exclusion amount to \$3.5 million (or lower) starting 01/01/2017.