Post-Mortem Estate Planning
Income Tax Issues That Arise

Prepared by:
Kenneth E. Konop
Miller, Canfield, Paddock and Stone, P.L.C.

LORMAN®
Published on www.lorman.com - July 2018

Post-Mortem Estate Planning - Income Tax Issues That Arise

Written by: Kenneth E. Knopp

I. Checklist and representation letter

A. Identify the Client

The purpose of this section of the discussion is designed to move away momentarily from tax issues to review issues involving executors, trustees, beneficiaries and, perhaps, others – trust protector, creditor.

B. The trustee or the personal representative as the client.

1. If there is one trustee and one personal representative, they are the same and are either not a beneficiary or are the sole beneficiary, the rules seem simple enough.

2. Payment of attorney fees. Is this an obligation such that if not paid by the estate/trust it is paid by the trustee?

3. Who does the attorney represent and what duty does the attorney owe the beneficiary?

4. Engagement letter

5. Outline the scope of your representation! Beware of representation that varies from what is in the letter.

C. Multiple fiduciaries

Certainly we can represent multiple fiduciaries. Their interests need to be analyzed and clarified in the fee letter.

1. Are all of them the client?

2. The answer depends on what is in the engagement letter, but are all the clients.

3. Must you communicate simultaneously with all of them?

4. Absent some other agreement or understanding, the answer generally is yes – depending on circumstances – even if state laws allow a majority vote and there are multiple fiduciaries.

D. Fiduciaries that may have multiple interests – the fiduciary as a beneficiary – creditor – co-owner of a business or real estate that is owned by the estate.

1. Recent example – co-fiduciaries are uncle and nephew. The estate is a party to a Stock Redemption Agreement with the company that is also owned by the uncle.

2. The institutional fiduciary along with family members

3. This can present a challenge. How does the family view you?

4. As their attorney and not the institution?

5. How does the institution view the attorney?

6. Does the institution consult corporate counsel?

E. Identify who will do the tax returns – individual income tax – estate tax – fiduciary income tax – gift tax returns.

F. Checklist

1. Use of checklist to identify dates, task and responsibility. Both Federal and State tax and state law, dates, deadlines and responsibility.

2. Do you have such a list or letter that describes the information needed to undertake the representation?

G. Deadlines

This includes: Tax returns – Forms 1040, 1041, 709, 706; Disclaimers; IRA's and Retirement Plans;

H. Time can pass quickly – dealing with third-parties such as transfer agents, retirement plan/IRA administrators; and Creditor notice deadlines.

II.

A. Individual Retirement Accounts

B. See Natalie B. Choate's book and materials and fairly recent article Herman, "How to Draft Trusts to Own Retirement Benefits," 39 ACTC Law Journal 207 (2013).

1. If there is a designated beneficiary and the account owner dies before their required beginning date, the designated beneficiary can use their life expectancy. The designated beneficiary's life expectancy would be based on the "Single Life Table." There is no recalculation each year. Straight line distribution. So 60 yrs 3.83, 61 yrs 4.10, 62 yrs 4.26 and so forth.

2. If there is no designated beneficiary and the account owner dies before the account owner's required beginning date, then the beneficiary must withdraw all of the retirement account within five (5) years after the account owner's death.

3. The December 31 of the calendar year that contains the fifth (5th) anniversary the IRA owner's date of death. No requirement as to how it must be distributed. Wait till 5th year? This can arise if a beneficiary includes a charity and the distribution to the charity is not timely.

4. If there is no designated beneficiary and the account owner dies after the required beginning date, the beneficiary's required

minimum distribution can be calculated using the account owner's life expectancy. Must switch to the Single Life Table.

5. If there is a designated beneficiary and the account owner dies after their required beginning date the beneficiary's required minimum distribution is based on the longer of the account owners life expectancy based upon Single Life Table or the beneficiary's life expectancy based upon the Single Life Tables.

6. There are no spousal rollovers if the beneficiary is not a spouse but a beneficiary can undertake a trustee-to-trustee transfer. However, the account must remain in the name of the decedent.

7. A retirement account will have no designated beneficiary unless all of the beneficiaries qualify as designated beneficiaries.

8. If all the beneficiaries are individuals, the required minimum distribution looks to the life expectancy of the oldest beneficiary.

9. A solution is to create separate accounts for each multiple beneficiary prior to the December 31 of the year following account owner's death.

10. In such a case, each separate account can use the measuring life of the beneficiary of each sub account. There must be a distribution must be taken by that date.

11. This benefit applies to 401(a) plans, 403(b) plans and 451(b) governmental plans.

12. There is a deadline for determining the initial beneficiaries of an individual retirement account. That date is the September 30th of the year following the date of death.

13. Between the account owner's death and September 30 of the year following the year of death, non-individual beneficiaries,

such as a charity, can be removed or to use a disclaimer or other alternative such as creating separate accounts or outright distribution.

14. Practical question of who is the account owner and can direct the custodian regarding investments.

C. As a general rule, try to not name a trust as the beneficiary of a retirement account.

1. A trust can be useful as a beneficiary in situations where, for example, the beneficiary may be a second spouse, the beneficiary is a minor, the beneficiary is a special needs child, in the case of a taxable estate to fund a credit shelter trust, or the beneficiary cannot manage money.

- Credit Shelter Funding and income tax liability

- Wasting Asset?

2. The options are to possibly lose longest deferral option or an alternative is a trust that qualifies as a designated beneficiary.

3. That is, if the account owner dies after their required beginning date, the deferral, without recalculation can continue if a trust is the beneficiary regardless of what the trust provides.

4. If death of the account owner is before the required beginning date and the trust is a beneficiary initially the option is five years.

5. There are specific requirements if a trust is a beneficiary. They are: (1) The trust must be valid under state law; (2) the trust must be either irrevocable or become irrevocable on the account owner's death; (3) the trust’s beneficiaries must be identifiable; (4) certain documents must be provided in a timely fashion to

the plan administrator or IRA custodian; (5) the trust must be drafted so it is possible to determine the identity of the oldest beneficiary and the beneficiaries must be individuals. The fifth is not a "formal" requirement.

6. Generally if a trust in gross is named as the beneficiary the rule is either five years or the life of the other beneficiary and the beneficiaries are all individuals.

7. There are two (2) types of trusts that can meet the requirement, they are an “accumulation trust” or a see-through trust.

8. A see-through trust or conduit trust is a trust where the required minimum distribution is distributed immediately to the individual beneficiary.

9. An accumulation trust allows the IRA distribution to be retained by the trust and to be distributed at a later date.

10. A so-called conduit trust requires that all of the required minimum distribution is paid immediately to the individual who qualifies as the designated beneficiary.

11. In a conduit trust the distribution cannot be accumulated.

12. A conduit trust has its limitations because the money from the IRA must be distributed immediately. So not useful with special needs trust or beneficiary who cannot manage money.

13. If the IRA distribution can be accumulated in the trust then the trust is an accumulation trust.

14. Which beneficiaries count as designated beneficiaries? The income beneficiaries and then remainder beneficiaries. Extensive explanations and examples in references cited above.

15. Need to cleanse trust provisions of alternative takers

III. Foreign Trust

A. The "accidental" foreign trust. A trust can become a foreign trust upon the death of a grantor or a change in trustees. E.g. US citizen is settlor of grantor trust. Dies and trust becomes irrevocable. The sole trustee or one of two trustees are not US citizens and do not live in the US. Assets in the US.

B. Example

C. Two tests to determine whether trust is a foreign trust.

1. Who or what is a US person. The first definition is a citizen or resident of the United States, a domestic partnership, a domestic corporation, any estate (other than a foreign estate).

2. A trust if a court within the United States is able to exercise primary supervision over the administration of the trust, and one or more United States persons have the authority to control all substantial decisions of the trust.

D. The treatment of a trust and its beneficiaries depends on the residence of the trust, a two-part test. Reg. §301.7701-7 for determining whether a trust is domestic or foreign. A trust is considered a US person if it meets both of the following requirements:

1. A court within the US is able to exercise primary supervision over the administration of the trust (court test), and

2. One or more US persons have authority to control all substantial decisions of the trust (control test).

3. Multiple trustees

4. Removal of foreign trustee. Regulations provide an explanation of the timing.

Foreign Estate – The term “foreign estate” means any trust other than a trust described above.

Based on the example, there is at the death of the grantor a foreign trust.

3. If, for example, there are two trustees, one is a US person and the other is not, the trust will fail the second test.

4. What are some of the consequences of a trust becoming a foreign trust?

"In the case of any transfer of property by a US person to a foreign estate or trust, for purposes of this subtitle, such transfer shall be treated as a sale or exchange for an amount equal to the fair market value of the property transferred, and the transferor shall recognize as gain the excess of the fair market value of the property so transferred, over the adjusted basis (for purposes of determining gain) of such property in the hands of the transferor.

Exception – Subsection (a) shall not apply to a transfer to a trust by a US person to the extent that any person is treated as the owner of such trust under section 671.

Treatment of Trusts which Become Foreign Trusts – If a trust which is not a foreign trust become a foreign trust, such trust shall be treated for purposes of the section as having transferred, immediately before becoming a foreign trust, all of its assets to a foreign trust."

The consequence is that the property is treated as though it was sold. In the above example, since there is a step up in basis, the sole provision results in no gain.

Change the facts. Old trust. Spouse dies and surviving spouse (a US citizen becomes trustee) and dies 20 years later. The successor trustees are not US citizens and do not and never have lived in the US.

Form 3520 – "Titled Annual Return to Report Transactions with Foreign Trusts and the Receipt of Certain Gifts." The Instructions clearly define a reportable event as including the transfer of any money or property to a foreign trust including a transfer by reason of death.

IV. Disclaimer

A. §25.2518-2. Treas. Reg. Describes the Requirements for a qualified disclaimer. – For purposes of section 2518(a), a disclaimer shall be a qualified disclaimer only if it satisfies the requirements of this section. In general, to be a qualified disclaimer –

1. The disclaimer must be irrevocable and unqualified;

2. The disclaimer must be in writing;

3. The writing must be delivered to the person specified in paragraph (b)(2) of this section within the time limitations specified in paragraph (c)(1) of this section;

4. The disclaimant must not have accepted the interest disclaimed or any of its benefits; and

5. The interest disclaimed must pass either to the spouse of the decedent or to a person other than the disclaimant without any direction on the part of the person making the disclaimer.

Writing – (1) Requirements – a disclaimer is a qualified disclaimer only if it is in writing. The writing must identify the interest in property disclaimed and be signed either by the disclaimant or by the disclaimant's legal representative.

Delivery – The writing described above must be delivered to the transferor of the interest, the transferor's legal representative, the holder of the legal title to the property to which the interest relates, or the person in possession of such property.

"(d) *The acceptance or new acceptance of benefits can pose challenge. — (1)*

Acceptance. — A qualified disclaimer cannot be made with respect to an interest in property if the disclaimant has accepted the interest or any of its benefits, expressly or impliedly, prior to making the disclaimer. Acceptance is manifested by an affirmative act which is consistent with ownership of the interest in property. Acts indicative of acceptance include using the property or the interest in property; accepting dividends, interest, or rents from the property; and directing others to act with respect to the property or interest in property. However, merely taking delivery of an instrument of title, without more, does not constitute acceptance. Moreover, a disclaimant is not considered to have accepted property merely because under applicable local law title to the property vests immediately in the disclaimant upon the death of a decedent. The acceptance of one interest in property will not, by itself, constitute an acceptance of any other separate interests created by the transferor and held by the disclaimant in the same property. In the case of residential property, held in joint tenancy by some or all of the residents, a joint tenant will not be considered to have accepted the joint interest merely because the tenant resided on the property prior to disclaiming his interest in the property. The exercise of a power of appointment to any extent by the donee of the power is an acceptance of its benefits. In addition, the acceptance of any consideration in return for making the disclaimer is an acceptance of the benefits of the entire interest disclaimed.

(2) — If a beneficiary who disclaims an interest in property is also a fiduciary, actions taken by such person in the exercise of fiduciary powers to preserve or maintain the disclaimed property shall not be treated as an acceptance of such property or any of its benefits. Under this rule, for example, an executor who is also a beneficiary may direct the harvesting of a crop or the general maintenance of a home. A fiduciary, however, cannot retain a wholly discretionary power to direct the enjoyment of the disclaimed interest. For example, a fiduciary's disclaimer of a beneficial interest does

not meet the requirements of a qualified disclaimer if the fiduciary exercised or retains a discretionary power to allocate enjoyment of that interest among members of a designated class. See paragraph (e) of this section for rules relating to the effect of directing the redistribution of disclaimed property."

B. Spouse as beneficiary.

V. Subchapter S Election

A. If a QSST, the individual beneficiary of the trust, not the trustee, consents. The election is irrevocable and applies from the date of the election until the trust ceases to be a Qualified Subchapter S Trust.

1. The requirement that the beneficiary of the QSST consent raises possible issues.

2. One is the beneficiary is taxed on the income not the trust. Thus, the beneficiary likely will not want to pay the tax from other assets.

3. A decedent's estate can continue as a subchapter S stockholder and the estate can continue during the period of administration.

4. If a formerly revocable trust is the shareholder, there is a two year period.

5. The requirements that must be met if a trust is to qualify as a Subchapter S shareholder are as follows:

a. Owns stock in one or more electing corporations;

b. Distributes or is required to distribute all of its income to a citizen or resident of the US;

c. Has certain trust terms, including the requirement that there be only one income beneficiary;

d. Does not distribute any portion of the trust corpus to anyone other than the current income beneficiary during the income beneficiary's lifetime, including the time at which the trust terminates; and

e. The income interest of the current income beneficiary ceases on the earlier of such beneficiary's death or the termination of the trust (Code Sec. 1361(d)(3).

6. Upon the death of a beneficiary, the election remains in effect with the new current income beneficiary.

a. The current income beneficiary must terminate the election.

b. The new current income beneficiary must affirmatively refuse to consent to the election by signing and filing a statement within 15 days and two months after the date of on which he became the income beneficiary.

c. The termination is effective as of the date on which the new income beneficiary became the income beneficiary.

7. An alternative is that a trust can elect to be an "electing small business trust" ("ESBT").

a. The portion of an ESBT that consists of stock of one or more S corporations is treated as a separate trust in computing the tax attributable to the S corporation stock held by the trust.

b. The income of this portion of the ESBT is taxed to the beneficiary at the <u>highest</u> rate imposed on estates and trusts.

c. The taxable income includes:

(i) items of income, loss, or deduction allocated to the trust as an S corporation shareholder under the normal rules of subchapter S;

(ii) Gain and loss from the sale of S corporation stock;

(iii) State and local income taxes and administrative expenses directly related to the S corporation portion, reasonably allocable to the separate trust portion listed above.

d. Note that this is an election by the trust.

e. Section 645 election

(i) If an election is filed for a qualified revocable trust, the qualified revocable trust is treated and taxed for purposes of part of its related estate, (and not as a separate trust) during the election period.

(ii) A qualified revocable trust (QRT) is any trust (or portion thereof) that on the date of death of the decedent was treated as owned by the decedent by reason of a power held by the decedent.

(iii) A trust that was treated as owned by the decedent under section 676 by reason of a power that was exercisable by the decedent only with the approval or consent of a nonadverse party or with the approval or consent of the decedent's spouse is a QRT. A trust that was treated as owned by the decedent under section 676 solely by reason of a power held by a nonadverse party or by reason of a power held by the decedent's spouse is not a QRT.

(iv) An electing trust is a QRT for which a valid section 645 election has been made. Once a section 645 election has been made for the trust, the trust shall be treated as an electing trust throughout the entire election period.

(v) An executor is an executor, personal representative, or administrator that has obtained letters of appointment to administer the decedent's estate through formal or informal appointment procedures. Solely for purposes of Section 645, an executor does <u>not</u> include a person that has actual or constructive possession of property of the decedent unless that person is also appointed or qualified as an executor, administrator, or personal representative of the decedent's estate. If more than one jurisdiction has appointed an executor, the executor appointed in the domiciliary or primary proceeding is the executor of the related estate for purposes of this paragraph.

(vi) A related estate is the estate of the decedent who was treated as the owner of the QRT on the date of the decedent's death.

(vii) The election period is the period of time during which an electing trust is treated and taxed as part of its related estate.

(viii) If there <u>is</u> an executor of the related estate, the trustees of each QRT joining in the election and the executor of the related estate make an election under section 645 and this section to treat each QRT joining in the election as part of the related estate by filing a form for making the election (election form).

(ix) For the election to be valid, the election form must be filed not later than the time prescribed under section 6072 for filing the Form 1041 for the first taxable year of the related estate (regardless of whether there is sufficient income to require the filing of that return). If an extension is granted for the filing of the Form 1041 for the first taxable year of the related estate, the election form will be timely filed if it is filed by the time prescribed for filing the Form 1041 including the extension granted with respect to the Form 1041.

(x) In addition, as a condition to a valid section 645 election, the trustee of each QRT joining in the election and the executor of the related estate agree, by signing the election form under penalties of perjury, that:

(a) With respect to a trustee—

(1) The trustee agrees to the election;

(2) The trustee is responsible for timely providing the executor of the related estate with all the trust information necessary to permit the executor to file a complete, accurate, and timely Form 1041 for the combined electing trust(s) and related estate for each taxable year during the election period;

(3) The trustee of each QRT joining the election and the executor of the related estate have agreed to allocate the tax burden of the combined electing trust(s) and related estate for each taxable year during the election period in a manner that reasonably reflects the tax obligations of each electing trust and the related estate; and

(4) The trustee is responsible for insuring that the electing trust's share of the tax obligations of the combined electing trust(s) and related estate is timely paid to the Secretary.

(b) With respect to the executor—

(1) The executor agrees to the election;

(2) The executor is responsible for filing a complete, accurate, and timely Form 1041 for the combined electing trust(s) and related estate for each taxable year during the election period;

(3) The executor and the trustee of each QRT joining in the election have agreed to allocate the tax burden of the combined electing trust(s) and related estate for each taxable year during the election period in a manner that reasonably reflects the tax obligations of

each electing trust and the related estate;

(4) The executor is responsible for insuring that the related estate's share of the tax obligations of the combined electing trust(s) and related estate is timely paid.

(xi) If there is no executor for a related estate, an election to treat one or more QRTs of the decedent as an estate is made by the trustees of each QRT joining in the election, by filing a properly completed election form.

(xii) For the election to be valid, the election form must be filed not later than the time prescribed for filing the Form 1041 for the first taxable year of the trust, taking into account the trustee's election to treat the trust as an estate under section 645 (regardless of whether there is sufficient income to require the filing of that return).

(xiii) If an extension is granted for the filing of the Form 1041 for the first taxable year of the electing trust, the election form will be timely filed if it is filed by the time prescribed for filing the Form 1041 including the extension granted with respect to the filing of the Form 1041.

(xiv) Tax treatment and general filing requirements of electing trust and related estate during the election period

(a) If there is an executor –

(1) If there is an executor, the electing trust is treated, during the election period, as part of the related estate for all purposes of subtitle A of the Internal Revenue Code. Thus, for example, the electing trust is treated as part of the related estate for purposes of the set-aside deduction under section 642(c)(2), the subchapter S shareholder requirements of section 1361(b)(1), and the special offset for rental real estate activities in section 469 (i)(4).

(2) If there is no executor, the trustee treats the electing trust, during the election period, as an estate for all purposes of subtitle A of the Internal Revenue Code. Thus, for example, an electing trust is treated as an estate for purposes of the set-aside deduction under section 642(c)(2), <u>the subchapter S shareholder requirements of section 1361(b)(1)</u>, and the special offset for rental real estate activities under section 469(i)(4). The trustee may also adopt a taxable year other than a calendar year.

(xv) In general—The election period begins on the date of the decedent's death and terminates on the earlier of the day on which both the electing trust and related estate, if any, have distributed all of their assets, or the day before the applicable date. The election does not apply to successor trusts (trusts that are distributees under the trust instrument).

(xvi) Definition of applicable date:

(a) If a Form 706 is required to be filed as a result of the decedent's death, the applicable date is the later of the day that is 2 years after the date of the decedent's death, or the day that is 6 months after the date of final determination of liability for estate tax. Solely for purposes of determining the applicable date under section 645, the date of final determination of liability is the earliest of the following— No 706 – no extended date?

(1) The date that is six months after the issuance by the Internal Revenue Service of an estate tax closing letter, unless a claim for refund with respect to the estate tax is filed within twelve months after the issuance of the letter;

(2) The date of a final disposition of a claim for refund, as defined in paragraph (f)(2)(iii) of this section, that resolves the liability for the estate tax, unless suit is instituted within six months after a final disposition of the claim;

(3) The date of execution of a settlement agreement with the Internal Revenue Service that determines the liability for the estate tax;

(4) The date of issuance of a decision, judgment, decree, or other order by a court of competent jurisdiction resolving the liability for the estate tax unless a notice of appeal or a petition for certiorari is filed within 90 days after the issuance of a decision, judgment, decree, or other order of a court; or

(5) The date of expiration of the period of limitations for assessment of the estate tax provided in section 6501.

(6) No 706.

VI. Portability

A. The concept is simple. The unused estate tax exemption of the first spouse to die can be ported or used by the second spouse to die.

B. The first item on the agenda with the client is to determine who is giving advice on the tax matters and if it is you will portability be elected.

C. The portability election is made on a timely filed (including extension) Form 706. It is possible if portability is not timely elected to ask the IRS to permit a late election. To do so is costly, time consuming and not guaranteed.

D. The estate of a decedent who is survived by a spouse can make a portability election, which generally allows the surviving spouse to apply the decedent's deceased spousal unused exclusion (DSUE) amount to the surviving spouse's own transfers during life and at death.

E. The portability election is made by the timely filing of a complete prepared estate tax return. An estate tax return prepared in accordance with all applicable requirements is considered a "complete and properly prepared"

F. Can a surviving spouse who is not an executor file an estate tax return and make the portability election in different circumstances. A few of the circumstances described include those in which the spouse is given the right to file the estate tax return in a prenuptial or marital agreement, or the spouse has petitioned the appropriate local court for the spouse's appointment as an executor solely for the limited purpose of filing the estate tax return and the executor does not make the portability election. The Treasury Department and the IRS recognize the possibility that an executor may exercise the executor's discretion to not make the portability election, thus causing the estate to forfeit the opportunity to elect portability. The Code permits only the executor of the decedent's estate to file the estate tax return and make the portability election.

G. Estates that are not otherwise required to file an estate tax return under section 6018. The executor does not need to report the value of certain property that qualifies for the marital or charitable deduction.

H. The Treasury Department and the IRS acknowledge that, as with all tax returns, some errors or omissions made with respect to an estate tax return will be considered minor and correctible. However, the

Treasury Department and the IRS consider the issue of whether an estate tax return is complete and properly prepared to be determined most appropriately on a case-by-case basis by applying standards as prescribed in current law.

I. The Treasury Department and the IRS have concluded that, on balance, a timely filed, complete, and properly prepared estate tax return affords the most efficient and administrable method of obtaining the information necessary to compute and verify the DSUE amount, and the alleged benefits to taxpayers from an abbreviated form is far outweighed by the anticipated administrative difficulties in administering the estate tax.

J. The "Technical Explanation of the Revenue Provisions Contained in the 'Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010' Scheduled for Consideration by the United States Senate," J. Comm. on Tax'n, 111th Cong., JCX-55-10. (December 10, 2010), suggests that estates electing portability that are not otherwise required to file an estate tax return under section 6018(a) are intended to be subject to the same filing requirements applicable to estates required to file an estate tax return under section 6018(a).

K. Section 2010(c)(5)(B) grants the IRS the authority to examine returns of each deceased spouse of the surviving spouse to determine the DSUE amount allowed to be included in the applicable exclusion amount of the surviving spouse, even if the period of limitations under section 6501 has expired for assessing gift or estate tax with respect to the returns of the deceased spouse.

L. During an examination to determine the allowable DSUE amount, the examination authority of the IRS is not limited to issues of the reporting and valuation of assets, and other legal issues that may impact the availability of the DSUE amount to the surviving spouse.

- For the purpose of determining the allowable DSUE amount that takes place after the expiration of the period of limitations on assessment of tax, the valuation of assets may be adjusted upward or downward with a possible result that the allowable DSUE amount may decrease or increase.

M. 1. The final regulations consider whether, in the examination of a return for the purpose of determining the allowable DSUE amount that takes place after the expiration of the period of limitations on assessment of tax, an adjustment to the value of an asset reported on the return affects the basis of that asset under section 1014.

a. Section 1014 generally provides that the basis of property acquired from a decedent is the fair market value of such property on the decedent's date of death.

b. The Treasury Department and the IRS believe that a change to the date-of-death value of an asset included in the estate of a decedent survived by a spouse, made pursuant to an examination of a return of that decedent after the expiration of the period of limitations on the assessment of tax on that return, does not necessarily result in a change to the basis of that asset under section 1014.

c. Rather, the basis of property acquired from a decedent is determined in accordance with the existing principles of section 1014..

2. The Treasury Department and the IRS conclude that any expenses associated with an examination to determine the DSUE

amount to be included in the applicable exclusion amount of the surviving spouse should be treated as any other expense associated with the preparation of the surviving spouse's return.

a. Thus, in the case of an examination arising with respect to a gift tax return of the surviving spouse, such expenses are not deductible.

b. In the case of an examination arising with respect to an estate tax return of the surviving spouse, such expenses may be deductible if such expenses meet all of the applicable requirements for deductibility under section 2053.

3. Who may participate in the examination to determine the DSUE amount to be included in the applicable exclusion amount of the surviving spouse. In general, pursuant to the current rules, each taxpayer has the authority to participate in the resolution of the issues raised in the audit of his or her return.

4. Effect of Portability Election on Application of Rev. Proc. 2006-49

a. Rev. Proc. 2006-49 provides a procedure by which the IRS will disregard and treat as a nullity for Federal estate, gift, and generation-skipping transfer tax purposes a QTIP election made under section 2056(b)(7) in cases where:

1. The estates federal estate tax liability was zero regardless of the QTIP election. Thus making the QTIP election unnecessary.

2. The executor neither made nor was considered to have made the portability election.

3. Requirement of Rev. Proc. 2016-49 followed.

5. Some of the Portability Election Issues

   a. Continue to use two trusts;

   b. Second marriage;

   c. Disability;

   d. Prenuptial (Payment);

   e. Remarriage;

   f. Generation skipping tax (Not portable);

   g. State taxes;

   h. Asset management by surviving spouse;

   i. Asset protection;

   j. Unwind two trust estate plan; and

   k. Gifts