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Recent Case Increases Uncertainty for Surviving Spouses

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AUTHORED ARTICLE | 11.20.2017

The following article was featured in the November 2017 edition of *Legacy*, the Vorys newsletter focused on wealth planning.

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Since 2011 portability has allowed married couples to take full advantage of both spouses' estate tax exclusions without the use of tax planning trusts.

The U.S. Tax Court recently determined that the IRS can re-examine the deceased spouse's estate tax return that reported the unused exclusion, without regard to any statute of limitations. *Estate of Sower v. Commissioner*, 149 T.C. No. 11 (2017).

Frank Sower died in 2012. Frank's estate didn't use all of his estate tax exclusion and elected portability of \$1,256,033 deceased spousal unused exclusion (DSUE) that could be used upon the death of his wife, Minnie Sower. Frank's estate filed an estate tax return, and the IRS sent a closing letter to the estate that the return was accepted as filed.

Minnie died in 2013 and her estate claimed the DSUE. On audit more than three years after Frank's death, the IRS examined Frank's estate tax return and determined that it incorrectly failed to report taxable lifetime gifts. By reducing the DSUE by the amount of such gifts, Minnie's estate tax liability increased by \$788,165.

Minnie's estate argued that the IRS was barred from re-examining Frank's estate tax return either because the three-year statute of limitations had expired or because a closing letter had been issued. Both arguments were rejected by the Court because the Internal Revenue Code (IRC) specifically gives the IRS the authority to examine the return of the deceased spouse to make a determination with respect to the DSUE, and the court determined that the closing letter did not constitute a "closing agreement" that would prohibit the re-examination of Frank's estate tax return in relation to determining the DSUE available to Minnie's estate. IRC §§ 2010(c)(5)(B); 7121.

This holding creates uncertainty for surviving spouses who are intended to benefit from portability because the amount of DSUE reported on the deceased spouse's estate tax return is subject to IRS re-examination at any time. It remains to be seen whether there will be any corrective legislative action. Contact your Vorys estate planning attorney if you would like to discuss your estate tax exclusion.