

TRUSTS AND ESTATES LAW SECTION

Comments on the Addition of "Portability" to Part X of Revenue Article VII Legislation

T&E #8

March 11, 2014

S. 6359-B, Parts I and X

By: BUDGET

A. 8559-B, Parts I and X

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Senate Committee: Finance

Assembly Committee: Ways and Means

The Trusts and Estates Law Section of the New York State Bar Association respectfully submits the following additional comments to Part X of the 2014-2015 New York State Executive Budget Revenue Article VII Legislation (the "Budget Bill"), S.6359-B / A.8559-B, including its 21-Day Amendments; specifically, the Trusts and Estates Law Section recommends that New York allow "portability" of the applicable exclusion amount between spouses for New York estate tax purposes and do so in a manner that corresponds to the federal estate tax portability rules.

1. Background on Portability

As discussed in our prior comments to Part X of the Budget Bill, in order to better integrate the federal and New York State estate tax systems, we recommend that portability of the estate tax exemption between spouses be allowed for New York estate tax purposes, to match the corresponding federal estate tax portability rules that are set forth in Internal Revenue Code § 2010(c). Portability of the deceased spouse's entire unused exclusion amount for New York estate tax purposes (as opposed to partial portability) is necessary to avoid creating a significant federal/state mismatch that would undermine the objective of attaining a comprehensive integration of the federal and New York estate tax systems.

2. Proposed Legislative Language.

Set forth below is a proposed New York portability statute, which would be included as part of proposed N.Y. Tax Law § 952(c). The added language relating to portability appears in italics.

(c) Applicable credit amount. (1) A credit of the applicable credit amount shall be allowed against the tax imposed by this section as provided in this subsection. In the case of a decedent whose New York taxable estate is less than or equal to the basic exclusion amount, the applicable credit amount shall be the amount of tax that would be due under subsection (b) of this section on such

decedent's New York taxable estate. In the case of a decedent whose New York taxable estate exceeds the basic exclusion amount by an amount that is less than or equal to five percent of such amount, the applicable credit amount shall be the amount of tax that would be due under subsection (b) of this section if the amount on which the tax is to be computed were equal to the basic exclusion amount multiplied by one minus a fraction, the numerator of which is the decedent's New York taxable estate minus the basic exclusion amount, and the denominator of which is five percent of the basic exclusion amount. Provided, however, that the credit allowed by this subsection shall not exceed the tax imposed by this section, and no credit shall be allowed to the estate of any decedent whose New York taxable estate exceeds one hundred five percent of the basic exclusion amount. *Provided further, however, that the credit allowed by this subsection shall be increased by an amount equal to the unused applicable credit amount of the decedent's last deceased spouse.*

(2) For purposes of this subsection, unused applicable credit amount of the decedent's last deceased spouse is (i) the amount of the credit that would have been allowed under subdivision (1) on the New York taxable estate of the last deceased spouse if that spouse's New York taxable estate had been equal to the basic exclusion amount allowable at the date of death of the decedent's last deceased spouse reduced by (ii) the amount of the credit allowed the estate of the decedent's last deceased spouse. Provided, however, that no credit amount of the decedent's last deceased spouse shall be allowed if the New York taxable estate of the decedent's last deceased spouse was equal to or greater than the basic exclusion amount allowable at the date of death of such last deceased spouse. Provided further, however, the unused applicable credit amount of the decedent's last deceased spouse who was not a resident of the state of New York shall be equal to the unused applicable credit amount of the decedent's last deceased spouse calculated under the immediately foregoing sentence multiplied by a fraction, the numerator of which is the decedent's New York gross estate and the denominator of which

is the decedent's federal gross estate. Both the credit amount of the decedent's last deceased spouse, and the unused applicable credit amount of the decedent's last deceased spouse, as referenced in the immediately preceding two sentences of this subsection, shall take into account such adjustments as may be warranted pursuant to Tax Law § 952(c)(1).

The New York State Department of Taxation of Finance, presumably through the issuance of a Technical Services Memorandum, would be charged with the responsibility of determining “such adjustments as may be warranted pursuant to Tax Law § 952(c)(1)” in accordance with the language appearing in the last sentence of our proposed Tax Law § 952(c)(2). It should be noted, however, that due to the "cliff" aspects of proposed §952(c)(1), the determination of these adjustments would be extraordinarily complex.

Please note that as set forth in in our prior comments, we urge that the “cliff” aspects of proposed Tax Law § 952(c)(1) be eliminated in their entirety. Eliminating the estate tax cliff would render unnecessary the last three sentences of proposed Tax Law § 952(c)(2) and considerably simplify the computation of the § 952(c) credit.

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