
To: Members of The House Ways and Means Committee

From: Maryland State Bar Association Estate & Trust Law Section

Date: February 4, 2020

Subject: **House Bill 219** – Maryland Estate Tax – Portability

Position: **Support, With Amendments**

The Maryland State Bar Association (MSBA) Estate & Trust Law Section **supports** HB 219 – Maryland Estate Tax – Portability – **with amendments** as discussed below.

In 2018, the General Assembly enacted legislation allowing for the “portability” of the Maryland estate tax (“MET”) exemption between spouses. Under that statute – which took effect in January, 2019 – if one spouse dies with assets valued at less than the \$5 million MET exemption, an election can be made permitting the surviving spouse to use the remainder of that exemption upon her/his subsequent death. This change has significantly simplified estate planning for many Maryland couples.

As the new law was implemented in 2019, some procedural anomalies appeared requiring statutory redress or clarification. In particular, minor differences between certain federal and Maryland procedures promised to sew confusion among those charged with administering the tax as well as the public. As drafted, HB 219 addresses one of these problems. Working with the Comptroller’s office, the Estate & Trust Law Section has developed amendments addressing two others.

The current bill would allow the Comptroller to examine (audit) the MET return of a predeceased spouse after the statute of limitation otherwise would have expired for the sole purposes of determining if the portability election was made properly, and calculating the amount of unused exemption available to the surviving spouse. This aligns with federal practice in the same circumstances, and simplifies the administration of the first spouse’s estate by avoiding the need for cumbersome, time-consuming, and potentially unnecessary audits.

Under existing law, MET returns are due, if at all, nine months following a decedent’s death, which is identical to the putative deadline for federal estate tax returns. However, the IRS has determined that, where a federal estate tax return is to be filed solely for the purpose of electing portability, the return need not be filed until two years after the first spouse’s death. This allows time for the

surviving spouse to determine if the election is needed, and provides flexibility in ordering their affairs in the wake of a spouse's passing. The first proposed amendment to HB 219 brings Maryland's filing deadline in line with federal practice by specifying that, if a return is being filed for the sole purpose of electing portability (i.e. there is no MET filing requirement for the first spouse), the MET due date is two years following the first spouse's death.

Federal portability has been an option since 2013, while it only became available for the MET last year. The new law recognizes that time gap, and directs the Comptroller to rely on a valid federal portability election when the first spouse died before 2019. However, the current statute is not entirely clear as to whether the Comptroller also must rely on the numbers contained in the federal estate tax return where the first spouse was a Maryland resident who died before 2019. The second proposed amendment clarifies that the Comptroller must follow the federal return where the first spouse died before 2019 without an MET filing requirement. This is identical to the treatment of a nonresident predeceased spouse.

The final proposed amendment deletes redundant language in the existing text of HB 219.

Copies of the proposed amendments are attached to this testimony.

Nothing in this bill or the proposed amendments should have any material impact on Maryland's revenues.

For these reasons, the MSBA Estate & Trust Law Section **supports HB 219 and urges a favorable committee report with the amendments discussed above.**

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HB 219
Maryland Estate Tax – Portability

Amendments Proposed by the MSBA Estate & Trust Law Section

AMENDMENT 1: Ensure that the deadline for filing a portability-only Maryland estate tax return is identical to that for filing a portability-only federal return by amending Tax-General §7-305 as follows:

Article - Tax - General

§7-305.

(a) If a federal estate tax return is required to be filed, the person responsible for filing the federal estate tax return shall complete, under oath, and file a Maryland estate tax return with the Comptroller 9 months after the date of the death of a decedent.

(b) If a federal estate tax return is not required to be filed but a federal estate tax return would be required to be filed if the applicable exclusion amount under § 2010(c) of the Internal Revenue Code were no greater than the applicable exclusion amount specified under § 7-309(b) of this subtitle, the person who would be responsible for filing the federal estate tax return shall complete, under oath, and file a Maryland estate tax return with the Comptroller 9 months after the date of the death of the decedent.

(C) IF A MARYLAND ESTATE TAX RETURN IS FILED SOLELY FOR THE PURPOSE OF MAKING THE ELECTION UNDER SECTION 7-309(B)(9) OF THIS TITLE TO PERMIT A SURVIVING SPOUSE TO TAKE INTO ACCOUNT THE DECEASED SPOUSAL UNUSED EXCLUSION AMOUNT, THE PERSON FILING THE MARYLAND ESTATE TAX RETURN SHALL DO SO ON OR BEFORE THE SECOND ANNIVERSARY OF THE DATE OF DEATH OF THE DECEDENT.

[c] **(D)** (1) After a person files a Maryland estate tax return, the person shall file an amended Maryland estate tax return with the Comptroller if the Maryland estate tax liability is increased because of:

- (i) a change in the federal gross estate, federal taxable estate, federal estate tax, or other change as determined under the Internal Revenue Code;
- (ii) after-discovered property;
- (iii) a correction to the value of previously reported property;
- (iv) a correction to the amount of previously claimed deductions; or
- (v) any other correction to a previously filed return.

(2) (i) The amended return shall be filed within 90 days after the later to occur of the date of the event that caused the increase in the Maryland estate tax liability or the date on which the person required to file an amended Maryland estate tax return learned or reasonably should have learned of the increase in the Maryland estate tax liability.

(ii) On request, each register shall certify to the Comptroller the amount of inheritance tax paid for each decedent for whom an amended Maryland estate tax return is filed with the Comptroller.

AMENDMENT 2: Clarify that, when the predeceased spouse died before 2019 without a Maryland Estate Tax filing requirement, the federal estate tax return will be used for purposes of calculating the Maryland deceased spousal unused exclusion amount by amending Tax-General §7-309(b)(9)(i) as follows:

Article - Tax - General

§7-309.

(b) (9) (i) In this paragraph, “deceased spousal unused exclusion amount” means the applicable exclusion amount in effect at the time of the death of the last predeceased spouse of the decedent under paragraph (3) of this subsection reduced by the taxable estate of the last predeceased spouse:

1. as reported on a Maryland estate tax return filed with the Comptroller; or

2. as reported on a federal estate tax return, if

A. the last predeceased spouse was not a Maryland resident and no property with a Maryland estate tax situs was includible in the gross estate of the last predeceased spouse[.]; **OR**

B. THE LAST PREDECEASED SPOUSE DIED BEFORE JANUARY 1, 2019 AND NO MARYLAND ESTATE TAX RETURN WAS REQUIRED TO BE FILED WITH RESPECT TO THE PREDECEASED SPOUSE’S ESTATE.

AMENDMENT 3: Delete redundant language in proposed §7-309(b)(9)(iii) as follows:

On page 5, in line 10, delete “**THE EXPIRATION OF**”.