

Estate Tax: Delaware

TODD A. FLUBACHER AND J. ZACHARY HAUPT, MORRIS, NICHOLS, ARSHT & TUNNELL LLP,
WITH PRACTICAL LAW TRUSTS AND ESTATES

Search the [Resource ID numbers in blue](#) on Westlaw for more.

A Q&A guide to Delaware laws on estate taxation of transfers at death. This Q&A addresses whether a jurisdiction has any estate tax or other similar taxes imposed at death and, for jurisdictions currently imposing a state estate tax, includes an overview of the state estate tax system, the basic exemption amount, the calculation of the gross estate, available deductions, calculating the state estate tax, filing the state estate tax return, and paying the state estate tax. Answers to questions can be compared across a number of jurisdictions (see Estate Tax: State Q&A Tool).

The federal government has modified certain tax filing and payment deadlines in response to the 2019 novel coronavirus disease (COVID-19) pandemic and many states and municipalities have followed suit. Practitioners should check with the relevant taxing authorities for more information.

EXISTENCE OF ESTATE TAX

1. Does your state have an estate tax?

Delaware has no estate tax for decedents dying on or after January 1, 2018 (81 Del. Law ch. 52 (2017)).

Delaware had an estate tax for decedents dying before or on December 31, 2017. (Act of Jul. 2, 2017, 81 Del. Law ch. 52 (2017), 30 Del. C. §§ 1501 to 1510.)

OVERVIEW OF THE ESTATE TAX

2. To whom does the state estate tax apply in your state?

Delaware has no estate tax for decedents dying on or after January 1, 2018 (81 Del. Law ch. 52 (2017)).

For decedents dying on or before December 31, 2017, the Delaware estate tax applies to:

- Resident decedents.
- Non-resident decedents that owned real or tangible personal property situated in Delaware subject to the federal estate tax. (30 Del. C. §§ 1502 and 1504.)

3. How is the state estate tax calculated in your state?

Delaware has no estate tax for decedents dying on or after January 1, 2018 (81 Del. Law ch. 52 (2017)).

For resident decedents that died before July 1, 2009, the amount of the tax is equal to the state estate tax credit allowed under the 2001 Internal Revenue Code (30 Del. C. § 1502(b)).

For resident decedents that died after June 30, 2009 but before January 1, 2018, the amount of the tax is determined under the statutory table set out in Section 1502(c) of Title 30 of the Delaware Code (see Tax Rate).

For nonresident decedents dying before January 1, 2018, the amount of tax is computed in the same manner as for resident decedents. The result of that computation is then multiplied by a fraction:

- The numerator of which is the value of that part of the decedent's federal taxable estate consisting of real and tangible personal property located in Delaware.

- The denominator of which is the value of the decedent's federal taxable estate, excluding real and tangible personal property not located in any state.

(30 Del. C. § 1504.)

THE GROSS ESTATE

4. What is included in a decedent's gross estate for tax purposes? Specifically, please discuss what is included in:

- The gross estate of a resident decedent.
- The gross estate of a nonresident decedent.

Delaware has no estate tax for decedents dying on or after January 1, 2018 (81 Del. Law ch. 52 (2017)).

For decedents dying on or before December 31, 2017, Delaware statute did not refer to a gross estate for state estate tax purposes. Delaware instead referred to the Delaware taxable estate, which is the modified federal taxable estate:

- Increased by the amount of the state death tax deduction.
- Increased by the value of qualified terminable interest property (QTIP) that:
 - passed from the decedent's predeceased spouse;
 - for which a valid QTIP election was made on a timely filed Delaware estate tax return;
 - remains as of the decedent's date of death; and
 - was not included in the federal taxable estate.
- Decreased by the value of qualified terminable interest property that:
 - passed from the decedent to the decedent's surviving spouse;
 - for which an irrevocable QTIP election was made by decedent's personal representative on or submitted with a timely filed Delaware estate tax return and regardless of whether a QTIP election was made on a federal return for federal estate tax purposes; and
 - was included in the federal taxable estate.
- Decreased by the value of certain agricultural land and buildings enrolled in farmland assessment or farmland preservation programs to the extent this property was included in the federal taxable estate.

(30 Del. C. § 1501.)

RESIDENT DECEDENT GROSS (TAXABLE) ESTATE

The Delaware taxable estate of a Delaware resident decedent includes all of the decedent's property, no matter where located, that the decedent owned at death. Therefore, the Delaware taxable estate includes, but is not limited to, real estate, bank accounts and investment accounts, vehicles and other personal property, and business interests. (30 Del. C. §§ 1501 to 1503; 26 U.S.C. §§ 2051 to 2058.)

NONRESIDENT DECEDENT GROSS (TAXABLE) ESTATE

The Delaware taxable estate of a Delaware nonresident decedent includes all of the decedent's property that the decedent owned at death that is both:

- Located in Delaware.
- Taxable under Chapter 11 of the Internal Revenue Code.

The Delaware taxable estate of a nonresident decedent includes both real and tangible personal property.

(30 Del. C. §§ 1501 to 1504; 26 U.S.C. §§ 2051 to 2058.)

5. How are assets valued for state estate tax purposes? Specifically, please discuss:

- Availability of alternate valuation date.
- Requirements for alternate valuation.

Delaware has no estate tax for decedents dying on or after January 1, 2018 (81 Del. Law ch. 52 (2017)).

For decedents dying on or before December 31, 2017, the value of a decedent's Delaware taxable estate is derived from the decedent's federal taxable estate. Consequently, if an alternate valuation election is made on the decedents' United States Estate Tax Return Form 706, the decedent's Delaware taxable estate will reflect these alternate valuation amounts. (12 Del. C. § 1904.)

The personal representative of an estate may employ qualified and disinterested appraisers to assist in ascertaining the fair market value as of the date of the decedent's death of any asset the value of which may be subject to reasonable doubt (12 Del. C. § 1904).

ESTATE TAX EXEMPTION

6. Is there an exemption from estate tax in your state? Specifically, please discuss:

- Whether the estate tax exemption in your state is tied to the federal exemption.
- The amount of the exemption in your state.
- How the exemption amount is determined in your state.

Delaware has no estate tax for decedents dying on or after January 1, 2018 (81 Del. Law ch. 52 (2017)).

For decedents dying on or before December 31, 2017, the Delaware exemption varies depending on the date of death:

- For decedents that died after June 30, 2009 and before January 1, 2010, the exemption amount is \$3.5 million.
- For decedents that died in 2010:
 - if the decedent's personal representative elected out of the federal estate tax repeal of 2010, then the exemption amount is \$3.5 million; or
 - in all other cases, the exemption amount is \$5 million.
- If the decedent died after December 31, 2010, the exemption amount is the applicable exclusion amount set out in Section 2010(c) of the Code effective at the decedent's death. For current exemption amounts, see Federal Estate, Gift, & GST Tax Chart ([W-001-1314](#)).

(30 Del. C. § 1501(3).)

7. Can a deceased spouse's unused exemption (DSUE) be ported to a surviving spouse in your state?

Delaware has no estate tax for decedents dying on or after January 1, 2018 (81 Del. Law ch. 52 (2017)).

For decedents dying on or before December 31, 2017, Delaware permits a deceased spouse's unused exemption to be ported to a surviving spouse (see State of Delaware, Department of Finance, Division of Revenue, Form 900R and Form 900NR.)

DEDUCTIONS FROM GROSS ESTATE

8. Discuss the most common deductions that are available in your state for tax purposes.

Delaware has no estate tax for decedents dying on or after January 1, 2018 (81 Del. Law ch. 52 (2017)).

For decedents dying on or before December 31, 2017, Delaware statute did not refer to a gross estate for state estate tax purposes. Delaware instead referred to the Delaware taxable estate, which is the modified federal taxable estate as increased or decreased by certain adjustments (see Question 4).

Therefore, all federal deductions authorized by the Internal Revenue Code, except those for state and foreign death taxes, are used in calculating the Delaware taxable estate, including:

- Deductions for administration expenses, debts, and claims (26 U.S.C. § 2053 and see Administration Expenses, Debts, and Claims).
- Deductions for losses from casualty or theft during the administration of the estate (26 U.S.C. § 2054 and see Losses).
- The marital deduction (26 U.S.C. §§ 2056 and 2056(A) and see Marital Deduction).
- The charitable deduction (26 U.S.C. § 2055 and see Charitable Deduction).

ADMINISTRATION EXPENSES, DEBTS, AND CLAIMS

This category of deductions includes items, such as:

- Funeral and administration expenses.
- Claims against the estate, including mortgages on property included in the gross estate.
- Fees for attorneys, accountants, and appraisers.
- Executor's commissions.
- Income tax liability.

To be deductible, administrative expenses must be:

- Incurred on behalf of the estate, not the beneficiaries.
- Allowable by local law.
- Actually incurred in the collection of assets, payment of debts, and distribution of property to the persons entitled to it.

(26 U.S.C. § 2053 and 26 C.F.R. § 20.2053-3.)

LOSSES

Losses incurred during the settlement of estates arising from fires, storms, shipwrecks, other casualties, or theft, when these losses

are not compensated by insurance or otherwise, are deductible (26 U.S.C. § 2054).

MARITAL DEDUCTION

The unlimited marital deduction allows a decedent to transfer assets to the decedent's US citizen spouse free of estate tax (26 U.S.C. § 2056). The estate receives a deduction for assets passing from the decedent to the decedent's surviving spouse. The assets remaining at the time of the surviving spouse's death that are still owned by the surviving spouse are then included as part of the surviving spouse's estate. This deduction allows for a significant deferral and potential savings of estate tax.

Not all transfers to a surviving spouse qualify for the estate tax marital deduction. To qualify, an asset:

- Must be included in the decedent's gross estate.
- Cannot be otherwise deductible under another provision.
- Must pass at death from the decedent to the spouse.
- Cannot be a terminable interest.

(26 U.S.C. § 2056.)

No estate tax marital deduction is permitted for outright transfers to a noncitizen spouse. A limited marital deduction instead may be available to the extent that the decedent transfers assets to a qualified domestic trust (QDOT) for the benefit of the noncitizen surviving spouse. (26 U.S.C. §§ 2056(d) and 2056A.)

CHARITABLE DEDUCTION

An estate receives a deduction for the value of bequests to public, charitable, and religious organizations or entities, including qualified charitable trusts and foundations established by the decedent (26 U.S.C. § 2055). This deduction is limited to the extent of the value of the property transferred to the charity (26 C.F.R. § 20.2055-3).

To qualify for the charitable deduction, a transfer must be of property that is both:

- Included in the decedent's gross estate.
- Transferred from the decedent to a qualified organization.

(26 C.F.R. § 20.2055-1(a).)

APPLICABLE CREDITS AGAINST ESTATE TAX

9. Are there any applicable credits available against estate tax in your state?

Delaware has no estate tax for decedents dying on or after January 1, 2018 (81 Del. Law ch. 52 (2017)).

For decedents dying on or before December 31, 2017, Delaware allows a credit against the estate tax otherwise due for the aggregate amount of all estate, inheritance, legacy, and succession taxes actually paid to any other state for any property owned by the decedent or subject to those taxes:

- As part of or in connection with the estate.
- For which a credit or deduction for those taxes paid to any other state was allowable under the federal estate tax laws in effect as of the date of the decedent's death.

The credit is limited to the amount that does not reduce the estate tax due to an amount that is less than the estate tax otherwise due under Delaware law, multiplied by a fraction:

- The numerator of which is the value of that part of the decedent's federal taxable estate consisting of real and tangible personal property located in Delaware plus all intangible personal property.
- The denominator of which is the value of the decedent's federal taxable estate, excluding real and tangible personal property not located in any state.

(30 Del. C. § 1503.)

TAX RATE

10. What are the estate tax rates in your state?

Delaware has no estate tax for decedents dying on or after January 1, 2018 (81 Del. Law ch. 52 (2017)).

For decedents dying after June 30, 2009 but before January 1, 2018, the Delaware estate tax rate is a progressive tax that maxes out at 16% for estates valued at \$10,040,000 or more. The rate schedule is as follows:

| If the Delaware taxable estate is: | | The tax equals the sum of the figures calculated under columns (C) and (D): | |
|------------------------------------|------------------|---|---------------------------------|
| Over (A) | But not over (B) | Tax on lower amount (C) | Plus % of the excess amount (D) |
| \$0 | \$40,000 | \$0 | 0 |
| \$40,000 | \$90,000 | \$0 | 0.8 |
| \$90,000 | \$140,000 | \$400 | 1.6 |
| \$140,000 | \$240,000 | \$1,200 | 2.4 |
| \$240,000 | \$440,000 | \$3,600 | 3.2 |
| \$440,000 | \$640,000 | \$10,000 | 4.0 |
| \$640,000 | \$840,000 | \$18,000 | 4.8 |
| \$840,000 | \$1,040,000 | \$27,600 | 5.6 |
| \$1,040,000 | \$1,540,000 | \$38,800 | 6.4 |
| \$1,540,000 | \$2,040,000 | \$70,800 | 7.2 |
| \$2,040,000 | \$2,540,000 | \$106,800 | 8.0 |
| \$2,540,000 | \$3,040,000 | \$146,800 | 8.8 |
| \$3,040,000 | \$3,540,000 | \$190,800 | 9.6 |
| \$3,540,000 | \$4,040,000 | \$238,800 | 10.4 |
| \$4,040,000 | \$5,040,000 | \$290,800 | 11.2 |
| \$5,040,000 | \$6,040,000 | \$402,800 | 12.0 |
| \$6,040,000 | \$7,040,000 | \$522,800 | 12.8 |
| \$7,040,000 | \$8,040,000 | \$650,800 | 13.6 |
| \$8,040,000 | \$9,040,000 | \$786,800 | 14.4 |
| \$9,040,000 | \$10,040,000 | \$930,800 | 15.2 |
| \$10,040,000 | | \$1,082,800 | 16.0 |

(30 Del. C. § 1502.)

FILING THE STATE ESTATE TAX RETURN

11. Which estates must file a state estate tax return?

Delaware has no estate tax for decedents dying on or after January 1, 2018 (81 Del. Law ch. 52 (2017)).

For decedents dying on or before December 31, 2017:

- The personal representative of a resident decedent must file a Delaware estate tax return if the personal representative must file a federal estate tax return under the Code.
- The personal representative of a nonresident decedent having real or tangible personal property located in Delaware that is included in the value of the decedent's Delaware taxable estate must file a Delaware estate tax return if the personal representative must file a federal estate tax return under the Code.

(30 Del. C. § 1505(a).)

12. What forms are required to file a state estate tax return?

Delaware has no estate tax for decedents dying on or after January 1, 2018 (81 Del. Law ch. 52 (2017)).

Personal representatives of estates of Delaware residents that must file a Delaware estate tax return should file the State of Delaware, Department of Finance, Division of Revenue Form 900R.

Personal representatives of estates of nonresidents that must file a Delaware estate tax return should file the State of Delaware, Department of Finance, Division of Revenue Form 990NR.

13. Where is the state estate tax return filed?

Delaware has no estate tax for decedents dying on or after January 1, 2018 (81 Del. Law ch. 52 (2017)).

The Delaware estate tax return is filed by mailing it to the Delaware Division of Revenue at:

Delaware Division of Revenue

P.O. Box 2044

Wilmington, Delaware 19899-2044

(See State of Delaware, Department of Finance, Division of Revenue Form 900R and Form 900NR.)

14. Who is responsible for filing the state estate tax return on behalf of the estate?

Delaware has no estate tax for decedents dying on or after January 1, 2018 (81 Del. Law ch. 52 (2017)).

For decedents dying on or before December 31, 2017, the decedent's personal representative is personally liable for the filing and payment of any Delaware estate tax due (30 Del. C. § 1506(c)).

15. What is the due date for filing the state estate tax return?

Delaware has no estate tax for decedents dying on or after January 1, 2018 (81 Del. Law ch. 52 (2017)).

For decedents dying on or before December 31, 2017, the personal representative must file the Delaware estate tax return within nine months after the date of the decedent's death (30 Del. C. § 1505).

16. Is an extension available for filing the state estate tax return? Specifically, please discuss:

- How to apply for a filing extension.
- How many filing extensions are available.

Delaware has no estate tax for decedents dying on or after January 1, 2018 (81 Del. Law ch. 52 (2017)).

For decedents dying on or before December 31, 2017, the personal representative may file a written request with the Secretary of Finance for an extension of:

- Time to file the return.
- Time to pay the tax to a reasonable period from the initial due date.

If the time for filing the decedent's federal estate tax return is extended, the time for filing the Delaware estate tax return is automatically extended for the same period, if the personal representative furnishes an executed copy of the extension grant to the Delaware Division of Revenue before or with the filing of the return. (See State of Delaware, Department of Finance, Division of Revenue Form 900R and Form 900NR.)

17. Discuss the circumstances in which a state estate tax return may be required where a federal return is not.

Delaware has no estate tax for decedents dying on or after January 1, 2018 (81 Del. Law ch. 52 (2017)).

There is no circumstance under Delaware law where a state estate tax return is required where a federal return is not (30 Del. C. § 1505(a)).

PAYING THE TAX

18. When must the state estate tax be paid?

Delaware has no estate tax for decedents dying on or after January 1, 2018 (81 Del. Law ch. 52 (2017)).

For decedents dying on or before December 31, 2017, the personal representative must pay any tax due to the Delaware Division of Revenue on or before the date the return must be filed. This means the personal representative must pay any estate tax due within nine months after the decedent's date of death, unless an extension is granted. If payment is late and no extension is granted, interest begins to accrue at a rate of one-half percent per month for delinquent taxes (assessed from the due date to the ultimate date of payment). (30 Del. C. §§ 1505 to 1506.)

19. Is an extension available for paying the state estate tax? Specifically please discuss:

- How to apply for an extension for paying the estate tax.
- How many extensions for paying the estate tax are available.

Delaware has no estate tax for decedents dying on or after January 1, 2018 (81 Del. Law ch. 52 (2017)).

For decedents dying on or before December 31, 2017, on written request, the Division of Revenue may extend for a reasonable period the time for payment of the tax due.

When a decedent's estate has been granted a filing extension on the federal estate tax return, which in turn automatically extends the date for filing the Delaware state estate tax return (if an executed copy has timely been provided to the Division of Revenue), payment of the Delaware estate tax due is not also automatically extended. (See State of Delaware, Department of Finance, Division of Revenue, Form 900R and Form 900NR.)

20. Discuss any interest or penalty assessed for late tax payments of state estate tax.

Delaware has no estate tax for decedents dying on or after January 1, 2018 (81 Del. Law ch. 52 (2017)).

In Delaware, interest on late payment of state estate tax starts to accrue nine months after the date of death of the decedent at one-half percent per month unless an extension is granted (See State of Delaware, Department of Finance, Division of Revenue, Form 900R and Form 900NR).

21. How is the state estate tax due allocated among the estate beneficiaries?

Delaware has no estate tax for decedents dying on or after January 1, 2018 (81 Del. Law ch. 52 (2017)).

For decedents dying on or before December 31, 2017:

- If the decedent's will or other dispositive instrument (for example, revocable trust) specifically shows an intent to apportion the estate tax, the tax is apportioned accordingly (12 Del. C. § 2903).
- If the decedent's will or other dispositive instrument does not provide for apportionment, the following rules apply:
 - the estate tax is apportioned ratably to each person that has an interest in the apportionable estate (12 Del. C. § 2904(1));
 - a generation-skipping transfer tax incurred on a direct skip taking effect at death is charged to the person to which the property interest is transferred (12 Del. C. § 2904(2));
 - if property is included in the decedent's taxable estate because of Section 2044 of Title 26 of the United States Code (addressing certain property for which the marital deduction is permitted) or any similar estate tax provision, the difference between the total estate tax for which the decedent's estate is liable and the amount of the estate tax for which the

decedent's estate would have been liable if the property had not been included in the decedent's taxable estate is apportioned ratably among the holders of the property interests. The balance of the tax, if any, is apportioned ratably to each other person having an interest in the apportionable estate. (12 Del. C. § 2904(3).); and

- an estate tax apportioned to persons holding interests in property subject to a time-limited interest must be apportioned, without further apportionment, to the principal of that property (12 Del. C. § 2904(4)).
- The apportionment rules of Sections 2903 to 2907 of Title 12 of the Delaware Code do not apply to the estate of a decedent that dies on or within three years after January 1, 2014, nor to the estate of a decedent that dies more than three years after January 1, 2014 if the decedent continuously lacked testamentary capacity from the expiration of the three-year period until the date of death. (12 Del. C. § 2914(a)). For the estate of a decedent that dies on or after January 1, 2014, to which Sections 2903 to 2907 do not apply, estate taxes must be apportioned under the law in effect immediately before January 1, 2014 (12 Del. C. § 2914(b)).

22. Who is liable if the state estate tax is not paid?

Delaware has no estate tax for decedents dying on or after January 1, 2018 (81 Del. Law ch. 52 (2017)).

In Delaware, the personal representative is personally liable for unpaid estate tax (though the personal representative may recover these unpaid sums, under statute, from certain beneficiaries receiving distributed assets from the decedent's Delaware taxable estate) (30 Del. C. § 1506).

OTHER TRANSFER TAXES PAYABLE AT DEATH

23. Are there any other taxes that apply to the transfer of assets on death in your state? For answer, include a brief description of the tax.

Delaware has no estate tax for decedents dying on or after January 1, 2018 (81 Del. Law ch. 52 (2017)).

Delaware currently does not impose an inheritance tax. The Delaware inheritance tax was repealed effective for deaths occurring on or after January 1, 1999. (71 Del. Laws ch. 353, HB 771.)

ABOUT PRACTICAL LAW

Practical Law provides legal know-how that gives lawyers a better starting point. Our expert team of attorney editors creates and maintains thousands of up-to-date, practical resources across all major practice areas. We go beyond primary law and traditional legal research to give you the resources needed to practice more efficiently, improve client service and add more value.

If you are not currently a subscriber, we invite you to take a trial of our online services at legalsolutions.com/practical-law. For more information or to schedule training, call **1-800-733-2889** or e-mail referenceattorneys@tr.com.