



The Time to File the Portability Election Extended to Five Years

The IRS has issued new guidance providing additional time to file for portability of a deceased spousal unused exclusion amount (DSUE). Portability allows a surviving spouse or decedent's estate to claim any unused estate and gift tax exemption remaining after the death of the first spouse. The "portability election" may now be filed within five years of the spouse's date of death (an extension from the former two-year deadline). This guidance also allows taxpayers to recover certain gift and estate taxes paid and request a refund of private letter ruling request fees, if applicable, in relation to this new five-year rule.

What is the New Portability Election Guidance?

The IRS extended the period for DSUE portability elections to five years after the death of the first spouse with a new simplified filing method in Revenue Procedure 2022-32. These new procedures supersede Revenue Procedure 2017-34. Prior to this new guidance, portability elections were required to be filed within two years of the date of death. Filing a late portability election after two years was possible but required taxpayers to submit a request for a letter ruling from the IRS. The letter ruling process is expensive and the work backlog burdened IRS resources, according to Revenue Procedure 2022-32.

To qualify under this revenue procedure, the following requirements must be met:

- The decedent:
 - Was survived by a spouse
 - Died after December 31, 2010
 - Was a citizen or resident of the United States on the date of death
- The executor:
 - Was not required to file a federal estate tax return based on the value of the gross estate and adjusted taxable gifts
 - Did not file an estate tax return within the time required by Treas. Reg. 20.2010-2(a)(1) for filing an estate tax return
 - Filed Form 706 under the procedures outlined in the Revenue Procedure to make a late portability election

What Other Benefits are Included in this New Guidance?

In addition to extending the filing deadline, Revenue Procedure 2022-32 allows taxpayers to recover gift and estate taxes paid that would not be required with application of Revenue Procedure 2022-32. A protective claim for credit or refund of tax can be filed on Form 843 if the new portability rules could have been favorably applied and resulted in no gift or estate tax due. Finally, if a private letter ruling was submitted to request portability in excess of two years, and the spouse or estate is eligible for portability under this new guidance, the taxpayer may be eligible for a refund of the IRS fee associated with the ruling request.





Why is filing a portability election important?

The exemption amount is \$12.06 million for taxpayers that die in 2022. Under current law, the estate tax exemption is scheduled to significantly decrease in 2026 from the current \$12.06 million amount and return to \$5 million per person, as adjusted for inflation. With the adjustment for inflation, it is expected that the exemption will be somewhere between \$6 million and \$7 million per person. This will likely increase the number of taxpayers subject to estate tax, making the portability election valuable to more surviving spouses.

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