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# irs gives surviving spouses a second (or third) bite at the portability apple

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*MSK Client Alert*

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"Portability" is the ability of a surviving spouse to use not only his or her own estate tax exemption, but also some or all of the exemption of the first spouse to die, as long as the first spouse died in 2011 or later. With the estate tax exemption for 2017 at \$5,490,000, this can allow estates of nearly \$11,000,000 to escape estate tax. While a full discussion of portability is beyond the scope of this post, suffice it to say that portability can save the day in one or more of these situations: if proper estate planning has not been done, if life insurance, IRAs or retirement plans left to the surviving spouse constitute a very large portion of a couple's assets, or if a couple's assets of any type are worth near the value of one exemption but less than both (e.g., \$4,500,000 to \$10,500,000).

The catch is that if the deceased spouse's assets are worth less than his or her exemption amount, the deceased spouse's executor has to file a federal estate tax return (Form 706) for the deceased spouse to "claim" the deceased spouse's unused exemption and thus invoke "portability." This is the direct opposite of the normal rule that if a decedent's estate is worth less than the estate tax exemption amount (after taking lifetime gifts into account), no estate tax return filing is necessary. But if the deceased spouse's executor does not file a timely estate tax return for the deceased spouse (nine months after the date of death, or an additional six months thereafter if a request for an extension was properly filed by the nine month deadline), the ability to use portability is permanently lost.

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