The IRS Extends Time to Make Portability Election

Article
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The IRS recently extended the period of time during which a surviving spouse can make a "portability election," which enables the surviving spouse to reduce or eliminate federal estate taxes that otherwise may be due at the surviving spouse's death.

In 2022, every person has a federal estate tax exclusion amount – an amount that can be gifted during their lifetime or passed to beneficiaries at the time of death without paying federal estate tax – of $12.06 million. Currently, Wisconsin does not have an estate or inheritance tax. Upon the death of a spouse, if the value of the deceased spouse's estate is below the exclusion amount, the surviving spouse has an opportunity to "port" that deceased spouse's unused exclusion (DSUE) to the surviving spouse. Assuming the surviving spouse has not remarried, the ported amount is then added to the surviving spouse's own exclusion amount, enabling the surviving spouse to further reduce or eliminate federal estate tax that otherwise might be due at the time of the surviving spouse's death.

Historically, the executor of the deceased spouse's estate had 9 months to elect portability, which is done by filing an Estate (and Generation-Skipping Transfer) Tax Return, Form 706, but could file for a 6-month extension. In 2017, the IRS issued Revenue Procedure 2017-34, which extended the election period to two years if certain conditions were met. In Revenue Procedure 2022-32, the IRS recently extended the period to five years. Now, the executor of the decedent spouse's estate has up until the fifth anniversary of the decedent spouse's death to elect portability. This ruling applies where the decedent was a U.S. citizen or resident, is survived by a spouse, the decedent's estate is not required to file an estate tax return, the estate did not already file a timely estate tax return, and the decedent died after 2010.

The current estate tax exclusion amount of $12.06 million was established under the Tax Cuts and Jobs Act, which is set to expire at the end of 2025. Unless Congress acts to change, starting in 2026 the exclusion amount is scheduled to return to a base amount of $5 million per person (approximately $6.5 million with inflation). The Biden Administration has expressed support for an estate tax exclusion amount lower than the current amount.

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Below is an example of how making the portability election can reduce federal estate tax. In 2019, John Doe died, and the value of his estate was $1 million. The estate tax exclusion amount was $11.4 million in 2019. John's surviving spouse, Jane Doe, did not elect portability. The recent IRS rule gives Jane an additional window to elect portability because it is within five years of John's death. If Jane, as the executor of John's estate, filed an Estate Tax Return electing portability by the 5th anniversary of John's death, then Jane would have $10.4 million ($11.4 exclusion in 2019 – $1 million value of John's estate) of John's ported exclusion to use upon her death in addition to her own exclusion amount. Assume Jane dies in 2026, her estate is worth $10 million at the time of her death, and the exclusion amount in 2026 is $6.5 million. The $6.5 million figure is a prediction based on the expiration of the Tax Cuts and Jobs. Since Jane made the portability election, her exclusion amount at the time of death is $16.9 million ($10.4 million DSUE + $6.5 million of her own exclusion). Since Jane's estate is less than her exclusion amount, no federal estate tax is due. If Jane had not made the portability election, Jane's estate would owe an estate tax of $1.4 million ($10 million value of estate – $6.5 million exclusion = $3.5 million taxable estate x 40% estate tax rate).

As the above examples indicate, portability is a powerful technique for the reduction or elimination of federal estate tax. The IRS's recent ruling gives more time for an executor to make such an election. Under the ruling, if a spouse died within the last approximately 4.5 years, the executor has an opportunity to make such an election (the Estate Tax Return can often take up to 6 months to prepare). Making the portability election might be especially important as we get closer to 2026, when the estate tax exclusion amount will be dramatically reduced unless Congress acts to preserve the higher exclusion.