

Estate Tax Portability Election Available For Surviving Spouses

The estate tax concept known as “portability” was first introduced for married persons dying on or after January 1, 2011. Portability was originally scheduled to expire on December 31, 2012, but was made a permanent feature of the estate tax as part of “The American Taxpayer Relief Act of 2012”.

Portability allows the executor of an estate to elect to transfer any unused estate tax exemption to a surviving spouse. The unused exemption received by the surviving spouse is referred to as the “Deceased Spousal Unused Exclusion” (DSUE) amount. Once the election is made by the executor, a surviving spouse can use the DSUE amount received against any future taxable gifts or transfers at death. An example of the utilization of the DSUE is:

Husband dies on July 1, 2016 with a taxable estate of \$4 million. For 2016, the estate and gift tax exemption is \$5.45 million per individual. The husband has \$1.45 million of unused exemption on his date of death. If the executor of the estate makes the portability election, the \$1.45 million of DSUE will transfer to the surviving spouse. This leaves the surviving spouse with a total exemption of \$6.9 million (her \$5.45 million exemption + \$1.45 million from her husband) that she can use against future taxable gifts or transfers at her death.

For a surviving spouse to receive the DSUE amount, the executor of the estate of the first spouse to die must make an election on a timely filed Form 706, United States Estate (and Generation-Skipping Transfer) Tax Return. However, an estate with a gross estate below the \$5.45 million exemption is not required to file Form 706. This can create a dilemma for the executor of such an estate who then must make a cost-benefit analysis to determine whether the administrative costs and requirements of filing Form 706 are worth the future benefit of transferring the DSUE. If the executor chooses not to file Form 706, the surviving spouse’s estate will not be able to claim the DSUE.

The executor should consider the potential that the surviving spouse will amass additional wealth through appreciation of estate assets, inheritance, or some other means. If this is a valid contingency, the executor should consider filing Form 706 even though it is not required in order to make the portability election. Using the facts of the prior example:

The executor of the husband’s estate did not make the portability election. The spouse’s taxable estate grows to \$6.5 million at her death. The estate and gift tax exemption is \$5.45 million at the time of her death. In this scenario, the spouse’s taxable estate would be \$1.05 million and it would owe approximately \$366,000 in estate tax. However, if the husband’s executor had filed Form 706 in order to make the portability election, the additional \$1.45 million DSUE would have resulted in the total available exemption reducing the spouse’s taxable estate to \$0.

If you are the executor of an estate and have questions about the estate portability election, please contact Josh Plunk at (817) 259-9074 or josh.plunk@whitleypenn.com.