

IRS Extends Late Portability Election

The IRS recently issued a new procedure (Revenue Procedure 2022-32) which extends the time an estate has to elect portability to five years after the decedent's date of death. Since portability is probably not top of mind for you, let us take a minute to review what portability is and why this news could be very useful information.

What is the portability election?

In its simplest terms, portability is a procedure that allows spouses to combine their estate and gift tax exemptions by allowing a surviving spouse to use their deceased spouse's unused exclusion (DSUE) amount. The surviving spouse then has their own exemption from estate and gift tax plus the unused exemption of their deceased spouse.

Example: Spouse 1 dies in 2022 when the exemption amount is \$12.06 million. Spouse 1 used \$2 million of their exemption amount to make gifts during their lifetime, leaving a DSUE amount of \$10.06 million. Spouse 2 can elect portability to combine Spouse 1's \$10.06 million unused exemption amount with their own exemption amount.

What was the prior deadline, and why did the IRS issue a new deadline?

Prior to Revenue Procedure 2022-32, for estates not required to file an estate tax return, the deadline to elect portability was two years after the decedent's death. (For estates required to file an estate tax return, the due date for the return is nine months after the decedent's death, or if an extension has been obtained, the last day of the extension period, regardless of whether the estate elects portability.) However, the IRS was receiving a significant number of requests for private letter rulings from estates that did not meet the two-year deadline, placing a considerable burden on the IRS's resources. The IRS observed that many of these requests were from estates where the decedent had died within five years of the request, thus prompting issuance of Revenue Procedure 2022-32, which extends the election period to five years after the decedent's death.

Why might you be filing late?

Because many couples own property jointly, when the first spouse passes away, the surviving spouse becomes the sole owner of their deceased spouse's property by operation of law; thus, they often do not consult with any advisors at the first spouse's death. If the value of the surviving spouse's money and property is greater than their individual exemption amount, or if the value of their money and property increases after the death of the first spouse, then the surviving spouse's individual exemption amount alone may not be enough to avoid the payment of estate taxes.

Example: Spouse 1 and Spouse 2 own property worth \$10 million. Spouse 1 dies in 2022 when the estate tax exemption amount is \$12.06 million. Because everything was owned jointly, all property automatically passes to Spouse 2 as the sole owner. Spouse 2 does not file an estate tax return to elect portability at Spouse 1's death and does not have to because Spouse 1's assets were worth less than Spouse 1's remaining estate tax exemption amount. When Spouse 2 passes away in 2026, the exemption is approximately \$6 million, and Spouse 2's property is now worth \$14.06 million, meaning that estate taxes will be owed on the \$8.6 million not covered by Spouse 2's exemption amount. If Spouse 2 had used the extended five-year period for electing portability to claim Spouse 1's unused \$12.06 million exemption amount, the entire estate could have

been shielded from estate taxes ($(\$14.06 \text{ million} - \$12.06 \text{ million}) - \$6 \text{ million} = \text{no estate tax due}$).

If you need more information about portability and how it might apply to you, please contact us and your tax preparer for help in analyzing your financial and tax situation. We are here to assist you in that analysis and direct you in taking next steps.