

The Deceased Spouse's Unused Exemption Amount: a Spouse's Final Gift

Spouses often work together to build wealth for themselves and their children. Congress recognized this by enacting the gift and estate tax portability election as part of the 2010 Taxpayer Relief, Unemployment Insurance Reauthorization, and Job Creation Act and making it permanent in the American Taxpayer Relief of 2012, providing married couples with a relatively simple way to potentially shield much more of their wealth from federal gift and estate taxation. If you have recently lost your spouse, it is important to consider whether you should take advantage of the portability election.

What Is Portability of the DSUE?

In 2023, the federal estate tax exclusion amount is \$12.92 million for individuals and \$25.84 million for married couples, and only gross estates that exceed these amounts are subject to estate tax. Due to the unlimited marital deduction, married couples with large estates are usually able to avoid estate taxes at the death of the first spouse. However, at the death of the surviving spouse, their estate, including the amount that they inherited from their spouse, will be subject to estate taxes if the gross estate of the second spouse to die exceeds the estate tax exclusion amount. Prior to the enactment of the portability election in 2010, in the absence of complex planning, for example, forming a credit shelter trust with the deceased's accounts and property equal to their remaining lifetime exclusion amount, the unused exclusion amount of the first spouse to die was lost, meaning that the couple's children would inherit less of the couple's wealth at the second death because only the second to die's remaining lifetime exclusion amount was available to reduce the estate tax that had to be paid. The portability election allows the surviving spouse to add the deceased spouse's unused exclusion (DSUE) amount to their own exclusion amount to reduce or eliminate estate tax liability when they die.

How Do You Elect Portability?

To take advantage of portability of the DSUE amount, after one spouse dies, the surviving spouse must file an estate tax return (Form 706) and make a portability election that allows the DSUE amount to be applied to the surviving spouse's subsequent transfers during life or at death. Portability must be elected properly or it will be ineffective, so it is important to seek the help of a tax professional.

If the deceased spouse's gross estate exceeds the basic exclusion amount (\$12.92 million), a federal estate tax return must be filed within **nine months** of the date of death (although a six-month extension is available). To take advantage of the DSUE amount, the executor of the deceased spouse's estate must elect portability and compute the DSUE amount on the timely estate tax return. No extension of time to elect portability is available in this situation.

Even if the deceased spouse's estate does not exceed the basic exclusion amount and the executor is not otherwise required to file an estate tax return, an estate tax return must be properly and timely filed to elect portability. Regulations issued by the US Department of the Treasury provide that in such cases, the due date of an estate tax return required to elect

portability is nine months after the decedent's date of death or the last day of the period covered by an extension.

In 2017, the IRS provided a simplified method for obtaining an extension of time to be used instead of the private letter ruling process that was available for a period extending to the second anniversary of the decedent's date of death. In July 2022, the IRS extended the time for estates that are not otherwise required to file an estate tax return to make a portability election from the second to the **fifth anniversary of the decedent's date of death** and allows a simplified method for obtaining the extension. Using the simplified method, an executor who wants to elect portability and has not yet filed an estate tax return—and was not otherwise required to do—only needs to file a “complete and properly prepared” estate tax return (Form 706) that states at the top that it is “FILED PURSUANT TO REV. PROC. 2022-32 TO ELECT PORTABILITY UNDER § 2010(c)(5)(A).” The five-year deadline and simplified process make it easier and less expensive for the surviving spouse to take advantage of their deceased spouse's unused exclusion amount, and in some cases, this could reduce or even eliminate federal estate taxes upon the death of the surviving spouse.

Why Should You Consider Electing Portability?

Although preparation of the estate tax return may seem like an unnecessary expense if your deceased spouse's money and property are not currently subject to estate tax, keep in mind that your wealth could grow substantially before your death, and the DSUE amount could be used to shield wealth that otherwise would be subject to estate taxes. In addition, although the current estate tax exemption amount is historically high, it is scheduled to be reduced by half at the end of 2025, so in only a few years, many more estates will be subject to estate tax liability unless the law is changed. In addition, some states have their own estate or inheritance taxes applicable to estates of a much lower value.

We Can Help

Portability is an important and valuable strategy to minimize your estate taxes. Please contact us if we can help you to determine if you should take advantage of a portability election, especially in light of the sunset of the doubled gift and estate tax exemption amount at the end of 2025.