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Increasing the Available Gift and Estate Tax Exemption for a Surviving Spouse

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In planning for the estate of a surviving spouse, the availability of the unused gift and estate tax exemption of his or her deceased spouse can be important, and particularly so with the impending reduction of the exemption. The federal gift and estate tax exemption, which was doubled pursuant to the 2017 Tax Cut and Jobs Act and presently stands at \$12,920,000, is scheduled to be automatically reduced by approximately one-half on January 1, 2026.^[1] The exemption is portable between spouses allowing for use by the surviving spouse of any unused exemption of the deceased spouse. This portability arises under IRC Section 2010(c)(5)(A), which provides that a deceased spousal unused exclusion (“DSUE”) amount becomes available for use with a surviving spouse’s subsequent transfers during life and at death, but only if the executor of the first-to-die’s estate timely files Form 706, United States Estate (and Generation-Skipping Transfer) Tax Return (“Form 706”). The due date of a Form 706 required to elect portability is the date which is nine months after the decedent’s death, or the last day of the period covered by an extension, which may be obtained for six additional months. The so-called DSUE election is automatically made by timely filing a Form 706 unless the executor affirmatively opts out as permitted on the return. The portability election, once made, becomes irrevocable once the due date of the Form 706, including extensions granted, has expired.

An executor may file a Form 706 for the estate of any U.S. citizen or resident, but the executor is only *required* to file a Form 706 under IRC Section 6018(a) if the value of the gross estate, plus adjusted taxable gifts, exceeds the exemption amount for the year of death. Given the effort and expense of preparing a Form 706 when not otherwise required, particularly when the assets of the surviving spouse are not expected to exceed the current exemption amount, a Form 706 is often not filed when the first spouse dies, resulting in the deceased spouse’s unused exemption being unavailable to the surviving spouse. With the scheduled reduction of the exemption after 2025, it may, in many cases, be important to recover that unused exemption of the deceased spouse for use by the surviving spouse. Recovering a deceased spouse’s unused exemption amount for use by the surviving spouse is now possible within five years after the first spouse’s death pursuant to Revenue Procedure 2022-32. On or before the fifth anniversary of the decedent’s death, the method in Revenue Procedure 2022-32 for preserving the decedent’s unused exemption is the exclusive procedure for obtaining an extension of time to make a portability election, replacing the prior two-year period under Revenue Procedure 2017-34 (and is to be used in lieu of the letter ruling process). Letter rulings may still be requested under Treasury Regulation Section 301.9100-3 if the requirements of Revenue Procedure 2022-32 are not satisfied or if a portability election is sought after the fifth anniversary of the decedent’s death.

The method under Revenue Procedure 2022-32 for obtaining an extension of time for making the portability election is available to the executor of the estate (either an appointed executor or, if none, a non-appointed executor described in Treasury Regulation Section 20.2010-2(a)(6), which generally is anyone in actual or constructive possession of any property of the decedent) if all of the following requirements are met:

1. The decedent:
 - Was survived by a spouse;
 - Died after December 31, 2010; and
 - Was a citizen or resident of the United States on the date of death.

2. The executor was not required to file a Form 706 under IRC Section 6018(a) as determined based on the value of the gross estate, plus adjusted taxable gifts, and without regard to the need to file for portability purposes.
3. The executor did not file a Form 706 within the time required by Treasury Regulation Section 20.2010-2(a)(1) for filing an estate tax return.
4. The executor must:
 - File a complete and properly prepared Form 706 on or before the fifth anniversary of the decedent's date of death; and
 - State at the top of the Form 706 that the return is "FILED PURSUANT TO REV. PROC. 2022-32 TO ELECT PORTABILITY UNDER SECTION 2010(c)(5)(A)".

Upon satisfaction of the foregoing requirements, the Form 706 for the decedent's estate will be considered to have been timely filed solely for purposes of electing portability, and the DSUE amount of the decedent will be made available to the surviving spouse for transfers made on or after the decedent's date of death. If the increased exemption available to the surviving spouse results in an overpayment of gift or estate tax by the surviving spouse or his or her estate, a claim for refund may be made unless the period of limitations under IRC Section 6511(a) has expired. An extension of time to elect portability does not extend the period for making a claim for refund. Revenue Procedure 2022-32 specifies that a timely claim for refund filed in anticipation of a Form 706 being filed to elect portability will be considered a protective claim for credit or refund of tax. Finally, if it is ultimately determined that a Form 706 was required to be filed based on the value of the gross estate, plus adjusted taxable gifts, the grant of an extension pursuant to Revenue Procedure 2022-32 will be deemed null and void.

^[1] The 2017 Tax Cuts and Jobs Act increased the basic exclusion amount provided in Section 2010 of the Internal Revenue Code of 1986, as amended (the "IRC"), from \$5,000,000, plus an inflation adjustment, to \$10,000,000, plus an inflation adjustment, for decedents dying or gifts made after December 31, 2017, and before January 1, 2026. With inflation, the federal gift and estate tax exemption amount is \$12,920,000 in 2023. It is estimated that the exemption amount will increase to \$13,610,000 in 2024.