

# Recent Procedure Extends Period to Elect Portability of a Deceased Spouse's Unused Exemption

John S. Lueken and Thomas H. Monarch

The IRS recently published Revenue Procedure 2022-32 to provide certain taxpayers a more simplified method to make a "portability" election under Section 2010(c)(5)(A) of the Internal Revenue Code. Taxpayers who qualify for this new simplified method will be able to elect portability of a Deceased Spouse's Unused Exemption (DSUE) up to five years after the decedent's date of death. This new procedure is an amazing federal estate tax savings opportunity for certain surviving spouses.

Electing portability of a DSUE allows a surviving spouse to claim the Federal estate tax exemption that was not used by a deceased spouse. The DSUE amount can be applied by the surviving spouse to both lifetime and testamentary gifts upon making a portability election on the deceased spouse's Form 706 United States Estate (and Generation-Skipping Transfer) Tax Return. For a surviving spouse with assets greater than his or her remaining estate tax exemption, the portability election has been one of the most effective and significant estate tax savings strategies.

*Example 1. Spouse 1 passes away on January 1, 2022 with a taxable estate of \$1,000,000 and with \$12,060,000 of estate tax exemption. Upon making the portability election on Spouse 1's Form 706, Spouse 2's available estate tax exemption will be increased by \$11,060,000 (\$12,060,000 minus \$1,000,000). Spouse 2 passes away on November 1, 2022 with a taxable estate of \$20,000,000, which can be offset by Spouse 2's increased Federal estate tax exemption of \$23,120,000 (\$12,060,000 of Spouse 2's exemption, plus the DSUE amount from Spouse 1 of \$11,060,000). The portability election allows Spouse 2 to have no Federal estate tax liability, rather than a tax liability of \$3,176,000.*

Prior to Revenue Procedure 2022-32, the portability election was required to be made within nine months after the decedent's date of death if a Form 706 was otherwise required or within two years of the decedent's date of death if a Form 706 was not otherwise required. If an estate did not make this election within the prescribed amount of time, the estate would be required to request a private letter ruling from the IRS asking for a special case exception. An IRS private letter ruling usually requires payment of a large user fee to the IRS (more than \$30,000) and it generally takes many months to obtain such a ruling. If such an exception is not granted by the IRS, the DSUE amount is lost and no longer usable by the surviving spouse.

This new Revenue Procedure 2022-32 extends the time to make the election to five years after the first spouse's date of death. This rule is retroactive in that it allows estates of first spouses who passed away less than five years ago to make the portability election if a Form 706 has not already been filed. No special request for an extension is required if the estate qualifies for this new procedure.

In order to qualify for the new portability election procedure, the decedent must meet the following requirements: (1) have been survived by a spouse; (2) passed away after December 31, 2010; (3) have been a United States citizen or resident on the date of death; (4) not have been required to file a Form 706; and (5) not have previously filed a Form 706 for his or her estate. All that is required to make the election under this new procedure is to: (1) file a Form 706; (2) make the portability election on the Form 706; and (3) state on the Form 706 that the return is "FILED PURSUANT TO REV. PROC. 2022-32 TO ELECT PORTABILITY UNDER § 2010(C)(5)(a)." This new procedure is not available to decedents' estates which have already filed a Form 706 because, by doing so, the decedent's estate would have either made or affirmatively opted out of the election.

*Example 2. Spouse 1 died on January 1, 2018 with a taxable estate of \$1,000,000 and an available Federal estate tax exemption of \$11,180,000. Spouse 1 is not required to file a Form 706 due to the size of Spouse 1's estate. Spouse 1 does not file a Form 706 for that reason, and thus neither makes nor opts out of the portability election. Spouse 2 passes away on July 1, 2022 with a taxable estate of \$20,000,000 and an available exemption of \$12,060,000. In order to avoid having an estate tax liability of \$3,176,000, a Form 706 making the portability election and properly stating it is being filed pursuant to Revenue Procedure 2022-32 for Spouse 1 should be filed before both the expiration of the five year limit, here, January 1, 2023, and the due date of Spouse 2's federal estate tax return. Upon the filing of Spouse 1's Form 706 making the portability election, Spouse 2's available Federal estate tax exemption is increased to \$22,240,000 (\$12,060,000 plus \$10,180,000), and thus Spouse 2 will have no Federal estate tax liability.*

In situations where the surviving spouse has already passed away and paid Federal estate tax, this new procedure will allow the executor of the surviving spouse's estate to file a protective claim for a refund or credit for any over payment of tax within three years after filing the surviving spouse's Form 706. If the protective claim is made by the surviving spouse's estate and the portability election in compliance with this new procedure is made by the first spouse's estate, the surviving spouse's estate will be able to obtain a refund or tax credit based on the amount overpaid. This extension to elect portability granted under this Revenue Procedure will not allow an estate to make a claim for an estate tax credit or refund if a protective claim is not made within three years after filing the surviving spouse's Form 706.

*Example 3. Spouse 1 died on January 1, 2018 with a taxable estate of \$1,000,000 and an available Federal estate tax exemption of \$11,180,000. Spouse 1 is not required to file a Form 706 due to the size of Spouse 1's estate. Spouse 1 does not file a Form 706 for that reason and thus neither makes nor opts out of the portability election. Spouse 2 passes away on January 1, 2022 with a taxable estate of \$20,000,000 and an available exemption of \$12,060,000. The estate tax liability of \$3,176,000 is then paid by the estate of Spouse 2 as no DSUE amount was ported to Spouse 2. With this new portability election procedure, the executor of Spouse 2's estate can now file a protective claim for a refund or tax credit of the \$3,176,000 in anticipation of making a portability election on a Form 706 for Spouse 1. The refund or tax credit can then be captured by filing a Form 706 for Spouse 1 which timely makes a portability election pursuant to Revenue Procedure 2022-32.*

This new procedure creates profound tax saving opportunities for surviving spouses who qualify, especially with the sunset of the current Federal estate tax exemption on the horizon effective January 1, 2026. If a Form 706 was not filed for the first deceased spouse, then this new portability election procedure should be considered.

John S. Lueken is a partner in Dentons and based in its Louisville office. He is chair of the firm's Estate Planning Department and co-leader of the Trusts, Estates and Wealth Preservation National Practice Group. Thomas H. Monarch is an associate in the Estate Planning Department in Dentons' Louisville office. ■



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