

Enjoying the View

**Why the First State
is Still the Leading
Jurisdiction for
Personal Trusts**



Portability Lost? You Now Have More Time Under Rev. Proc. 2022-32.



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“You now have additional time to elect portability and capture the historically high exclusion amounts applicable over the last few years.”

Since the passage of the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, section 2010(c) of the Internal Revenue Code (the “Code”) has allowed the personal representative of an estate to make an election to transfer the decedent’s unused federal basic exclusion amount to the decedent’s surviving spouse (which is currently \$12,060,000 for decedent’s dying in 2022 and set to increase to \$12,920,000 for 2023). This unused amount is defined under section 2010(c)(4) of the Code as the “deceased spousal unused exclusion amount” or the DSUE amount.

Under 2010(c)(5) of the Code, the election to make the DSUE amount available to the surviving spouse (commonly known as the portability election) must be made by filing a federal estate tax return within the time prescribed by law (including extensions). Treasury regulations promulgated with respect to Section 2010 make it clear that for an estate which is not required to file an estate tax return because the gross value of the estate falls below the basic exclusion amount, the due date to file the return, and thus to make a portability election, is nine months from the decedent’s date of death plus any period covered by an extension.

With many estates no longer required to file a return due to the significant increase in the basic exclusion amount over the last decade (as a result of various pieces of tax legislation and an annual inflation adjustment provided under the Code), the IRS has seen a significant increase in requests for private letter rulings to grant an extension of time to file an estate tax return for the purpose of making a portability election. Recognizing that many of these requests were received within a relatively short period of time after the due date of the return, the IRS issued Rev. Proc. 2017-34 adopting a simplified method to make a portability election even after the statutory timeframe for filing a return had expired.

Provided that (i) the decedent died after December 31, 2010, (ii) the decedent was a citizen or resident of the U.S. at his or her death, (iii) the decedent was survived by a spouse, (iv) the executor of the estate was not required to file an estate tax return due to the size of the gross estate, and (v) no return was filed within the timeframe required under the regulations, the executor of the estate could make the portability election by simply filing the estate tax return within two years of the decedent’s death and indicating conspicuously at the top of the return that it was being filed pursuant to Rev. Proc. 2017-34. In the event that a return was not filed within the two-year period, it would still be necessary to file a request with the IRS for a letter ruling seeking administrative relief with respect to the filing deadline.

In order to address the number of letter ruling requests still being received on the issue of portability, the IRS recently issued Rev. Proc. 2022-32, effective July 8, 2022. This revenue procedure, which supersedes Rev. Proc. 2017-34, adopts the same simplified method for making a portability election while extending the timeframe for doing so until the fifth anniversary of the decedent’s date of death. Otherwise, the same requirements indicated above continue to apply and the return must now clearly state that it is “FILED PURSUANT TO REV. PROC. 2022-32 TO ELECT PORTABILITY UNDER § 2010(c)(5) (A).” In the event you or your clients missed the two-year window under the prior revenue procedure and did not want to proceed with a request for a letter ruling, you now have additional time to elect portability and capture the historically high exclusion amounts applicable over the last few years.

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