

Tax Notes

IRS Simplifies Late Portability Election for Surviving Spouses

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The IRS recently released Revenue Procedure 2017-34 simplifying the method to extend the time to make a late portability election for estates of decedents leaving a surviving spouse.

A portability election allows a surviving spouse to use the decedent's remaining unused estate and gift tax exemption, which for 2017 is \$5,490,000. This deceased spousal unused exclusion (DSUE) is in addition to the surviving spouse's own exemption which can ultimately provide \$10,980,000 of value to pass Federal estate tax free during life or at death.

To obtain this benefit, the portability election must be requested by the decedent's estate and is only effective if made by the due date, including extensions, on a Form 706, United States Estate (and Generation-Skipping Transfer) Tax Return.

Background: Late Elections

The portability election became available for decedents dying after December 31, 2010. In order to take advantage of the unused exclusion amount, the executor of an estate was required to file a Federal estate tax return. Typically, Federal estate tax returns are only required for estates whose gross value was in excess of the exclusion amount. Many executors were unaware of the requirement to file a return for making the portability election. The failure to file caused the surviving spouse to lose the DSUE.

The IRS addressed this by permitting the late filing of the estate tax returns for decedents dying after December 31, 2010 through December 31, 2014. Beginning in 2015, the only way to make a late election was to request relief through a private letter ruling incurring high user fees and costs to prepare the relief request.

New Provision

This recent tax-friendly Revenue Procedure permits certain estates to make the portability election by filing a Form 706 on or before the later of:

- January 2, 2018, **or**
- the second anniversary of the decedent's death.

To be eligible, the decedent must have died after December 31, 2010 survived by a spouse and have been a citizen or resident of the United States. Furthermore, the estate must be under the filing threshold and not have filed any prior estate tax return.

Once granted, the surviving spouse (or surviving spouse's estate) can apply for a refund and/or credit for transfers made subsequent to decedent's date of death as long as the limitations period for filing a claim with respect to the transfer has not expired.

Contact Us

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