

Estate Tax Portability Election

James R. Hasselback

A. Electing Portability

1. A portability election for estate tax purposes allows a deceased spousal unused exclusion amount (DSUE amount) to become available for application to the surviving spouse's subsequent transfers during life or at death.
2. The estate must elect portability of the DSUE amount on an estate tax return that is filed within the time prescribed by law (including extensions) for filing such return. Thus, the due date of an estate tax return for electing portability is nine months after the decedent's death (plus any extension).
3. The estate of the deceased spouse must elect portability on a Form 706 which must show a computation of the deceased spousal unused exclusion (DSUE) amount.
 - a. Regulation section 20.2010-2(b)(1) requires that a decedent's DSUE be figured on the estate tax return.
4. The DSUE amount is the lesser of:
 - a. The basic exclusion amount in effect on the date of death of the decedent whose DSUE is being figured, or
 - b. The decedent's applicable exclusion amount less the tax computation on the Form 706 for the estate of the decedent.
 - 1) Amounts on which gift taxes were paid are excluded from adjusted taxable gifts for the purpose of this computation.
5. If an executor is appointed, qualified, and acting with the United States on behalf of the decedent's estate, only that executor may make or opt out of a portability election.
6. A nonresident surviving spouse who is not a citizen of the United States may not take into account the DSUE amount of a deceased spouse, except to the extent allowed by treaty with the nonresident surviving spouse's country of citizenship.

7. Form 706 if filed at the following address.
Department of the Treasury
Internal Revenue Service
Kansas City, MO 64999

If you're using a private delivery service (PDS), file at this address.
Internal Revenue Submission Processing Center
333 W. Pershing Road
Kansas City, MO 64108

If you're filing an amended Form 706, use the following address.
Internal Revenue Service Center
Attn: E&G, Stop 824G
7940 Kentucky Drive
Florence, KY 41042-2915

If you're using a PDS for your amended Form 706, use this address.
Internal Revenue Service Center
Attn: E&G, Stop 824G
7940 Kentucky Drive
Florence, KY 41042-2915

8. A portability election is irrevocable, unless an adjustment or amendment to the election is made on a subsequent return filed on or before the due date.
9. Example. If Bob and Sally are married and Bob dies in 2011 and only uses \$3,000,000 of his \$5,000,000 federal estate tax exemption, then Sally can elect to pick up Bob's unused \$2,000,000 exemption and add it to her own estate tax exemption. Assuming that Sally has not used any of her estate tax exemption for lifetime gifts and makes the portability election, then Sally will have a \$7,490,000 exemption in 2017 (Bob's unused \$2,000,000 exemption plus Sally's \$5,490,000 exemption = \$7,490,000 exemption).

B. Extensions to File Portability Election

1. Under Reg. 301.9100-3, the IRS can grant an extension of time to make an election whose due date is not prescribed by statute. If an estate is required to file a return because it meets or exceeds the filing threshold (the basic exclusion amount), the due date is set by statute and cannot be extended.
2. However, if the estate is not required to file a return based on the value of the gross estate and taxable gifts, and the executor files a return only to elect portability, the due date is set by regulation, not by statute. Accordingly, the estate can seek an extension of time to elect portability.

C. Simplified Method of Extensions

1. A simplified method under Revenue Procedure 2022-32 can be used only by estates that are not otherwise required to file an estate tax return (Form 706), based on the value of the gross estate. Under the simplified method, the estate's executor must file a complete and properly prepare Form 706 by the fifth annual anniversary of the decedent's death [Rev. Proc. 2022-32].
2. The simplified method under Revenue Procedure 2022-32 can be used only by estates that are not otherwise required to file an estate tax return (Form 706), based on the value of the gross estate. Under the simplified method, the estate's executor must file a complete and properly prepare Form 706 by the fifth annual anniversary of the decedent's death [Rev. Proc. 2022-32].
3. Under the special rule of Regulations section 20.2010-2(a)(7)(ii), executors of estates who are not required to file Form 706 under section 6018(a), but who are filing to elect portability of the DSUE amount to the surviving spouse, are not required to report the value of certain property eligible for the marital deduction under section 2056 or 2056A or the charitable deduction under section 2055. However, the value of those assets must be estimated and included in the total value of the gross estate.
4. The simplified method is not available to the estate of a decedent whose executor filed an estate tax return within the time prescribed by §20.2010-2(a)(1). Such an executor either will have elected portability of the DSUE amount by timely filing that estate tax return or will have affirmatively opted out of portability in accordance with § 20.2010-2(a)(3)(i).
5. The simplified method is in lieu of a letter ruling request and no user fee is required.
6. The Form 706 must state at the top that the return is "FILED PURSUANT TO REV. RUL. 2022-32 TO ELECT PORTABILITY UNDER §2010(C)(5)(a)."

D. Ineligible for Relief

1. Taxpayers ineligible for relief under this revenue procedure because they failed to meet the requirements can request an extension by requesting a letter ruling under Reg. 301.9100-3 and paying the user fee.

E. Other Provisions

1. If, subsequent to the grant of relief pursuant to this revenue procedure, it is determined that, based on the value of the gross estate and taking into account any taxable gifts, the executor was required to file an estate tax return under § 6018(a), the grant of an extension is deemed null and void.
2. An extension of time to elect portability granted under this revenue procedure does not extend the period during which the surviving spouse or the surviving spouse's estate may make a claim for credit or refund under § 6511(a).
3. A claim for credit or refund of tax filed within the time prescribed by the surviving spouse or the estate of the surviving spouse in anticipation of a Form 706 being filed to elect portability pursuant to this revenue procedure, and otherwise meeting applicable legal requirements, will be considered a protective claim for credit or refund of tax.

F. Simplified Method Examples

1. In Example 1. Predeceasing Spouse (S1) dies on January 1, 2021, survived by Surviving Spouse (S2). The assets includible in S1's gross estate consist of cash on deposit in bank accounts held jointly with S2 with rights of survivorship in the amount of \$7,700,000. After the marital deduction S1 has no taxable estate. S1 made no taxable gifts during life. S1's executor is not required to file an estate tax return under § 6018(a) and does not file such a return.

S2 dies on January 29, 2024 S2's taxable estate is \$17,000,000 and S2 made no taxable gifts during life. S2's executor files a Form 706 on behalf of S2's estate on October 29, 2025, claiming an applicable exclusion amount of \$13,610,000. S2's executor includes payment of the estate tax with the Form 706. S1's executor files a complete and properly prepared Form 706 on behalf of S1's estate on December 1, 2025, reporting a DSUE amount of \$11,700,000.

The executor includes at the top of the Form 706 the statement required by section 4.01(2) of Revenue Procedure 2022-32. The filing of the return satisfies the requirements for a grant of relief under Revenue Procedure 2022-32 and S1's estate is deemed to have made a valid portability election. The IRS accepts the return of S1's estate with no changes.

To recover the estate tax paid, S2's executor must file a claim for credit or refund of tax by October 29, 2027 (the end of the period of limitations prescribed in § 6511(a)), even though a Form 706 to elect portability was not filed on behalf of S1's estate at the time S2's estate filed its Form 706. Such a claim filed on Form 843, Claim for Refund and Request for Abatement, in anticipation of the filing of the Form 706 by S1's executor will be considered a protective claim for credit or refund of tax.

Accordingly, as long as the Form 843 is filed on or before October 29, 2027, the IRS can consider and process that claim for credit or refund of tax once S1's estate is deemed to have made a valid portability election and S2's estate notifies the IRS that the claim for credit or refund is ready for consideration.

2. Example 2. The facts relating to S1 and S1's estate are the same as in Example 1. S2 makes a gift to Child of \$15,000,000 on December 1, 2023. S2 has made no prior taxable gifts. On April 15, 2024, S2's executor files a Form 709, United States Gift (and Generation-Skipping Transfer) Tax Return, claiming an applicable exclusion amount of \$13,610,000. S2's executor tenders payment of the gift tax with the Form 709.

To recover the gift tax paid, S2's executor must file a claim for credit or refund of tax (protective or otherwise) within the time prescribed in § 6511(a) for filing a claim for credit or refund; in this case, April 15, 2027.

3. Example 3. The facts are the same as in Example 2 except that S2's Form 709 claims an applicable exclusion amount of \$17,610,000, including a DSUE amount of \$4,000,000 from S1's estate. As a result, the Form 709 reports no tax due and S2's executor tenders no gift tax. Although the portability election, once made, makes S1's DSUE amount available to S2 retroactively to S1's date of death, that DSUE amount is not available until the election is made.

Because S2's executor files the Form 709 before S1's estate makes the portability election, the claimed application of the DSUE amount will be denied and gift tax on the transfer will be assessed. S2's executor pays the gift tax assessed.

To recover that gift tax once the portability election has been made by S1's estate, S2's executor must file a claim for credit or refund of tax (protective or otherwise) within the time prescribed in § 6511(a) for filing a claim for credit or refund.

G. Surviving Spouse

1. The surviving spouse can apply the DSUE amount received from the estate of the surviving spouse's last deceased spouse against any tax liability arising from subsequent lifetime gifts and transfers at death.
2. The last deceased spouse is the most recently deceased person who was married to the surviving spouse at the time of that person's death. The identity of the last deceased spouse is determined as of the day a taxable gift is made, or in the case of a transfer at death, the date of the surviving spouse's death.
3. The identity of the last deceased spouse is not impacted by whether the decedent's estate elected portability or whether the last deceased spouse had any DSUE amount available. Remarriage also does not affect the designation of the last deceased spouse and does not prevent the surviving spouse from applying the DSUE amount to taxable transfers.
4. When a taxable gift is made, the DSUE amount received from the last deceased spouse is applied before the surviving spouse's basic exclusion amount. A surviving spouse may use the DSUE amount of the last deceased spouse to offset the tax on any taxable transfer made after the deceased spouse's death.
5. A surviving spouse who has more than one predeceased spouse is not precluded from using the DSUE amount of each spouse in succession. A surviving spouse may not use the sum of DSUE amounts from multiple predeceased spouses at one time nor may the DSUE amount of a predeceased spouse be applied after the death of a subsequent spouse.
6. Complete Section D if the decedent was a surviving spouse who received a DSUE amount from one or more predeceased spouses. Section D requests information on all DSUE amounts received from the decedent's last deceased spouse and any previously deceased spouses. Each line in the chart should reflect a different predeceased spouse; enter the calendar year(s) in column F.
7. In Part 1, provide information on the decedent's last deceased spouse. In Part 2, provide information as requested if the decedent had any other predeceased spouse whose executor made the portability election. Any remaining DSUE amount which was not used prior to the death of a subsequent spouse is not considered in this calculation and cannot be applied against any taxable transfer.
8. In column E, total only the amounts of DSUE received and used from spouses who died before the decedent's last deceased spouse. Add this amount to the amount from Part 1, column D, if any, to determine the decedent's total DSUE amount.

9. When a surviving spouse applies the DSUE amount to a lifetime gift or bequest at death, the IRS may examine any return of a predeceased spouse whose executor elected portability to verify the allowable DSUE amount. The DSUE amount may be adjusted or eliminated as a result of the examination; however, the IRS may only make an assessment of additional tax on the return of the predeceased spouse within the applicable limitations period under section 6501.

H. Expiration of TCJA

1. The estate tax exemption is set to decrease after December 31, 2025. In 2026, the exemption will drop to \$5 million (adjusted for inflation).