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New Five-Year Window to Claim Estate Portability for Surviving Spouses

Many law firms and CPAs are suggesting that surviving spouses of those dying after 12/31/2010 should file to claim portability for any unused estate exemption if they did not need to file previously.

You should contact your attorney or qualified professional to see if you should take advantage of IRS Revenue Procedure 2022-32, dated July 8, 2022.

Married couples have twice the estate tax exclusion of singles. However, unless portability is elected, the surviving spouse's estate exemption is cut in half when the surviving spouse dies.

Established as permanent with the passage of the American Taxpayer Relief Act of 2012, portability can play an integral role in helping you and your spouse - or future beneficiary - avoid or reduce future estate taxes. Many estates did not need to file an Estate Tax return (Form 706) if the estate value was below the filing requirement. Therefore, they failed to timely file the required Form 706 to claim the portability provision. The new IRS procedure allows for the filing of the portability exemption on Form 706 up to five years late.

The current estate tax and combined gift tax, called the Uniform Transfer Credit will be drastically reduced upon its 2025 expiration, unless Congress acts. Or the exemption could be reduced further, depending on which party controls Congress.

The US has very generous estate tax rules, where only the largest estates pay any significant tax upon death. The lucky heirs (born in the right womb) get an income tax-free step-up in tax basis, and income taxes are never paid on the gain incurred. The wealthy have other ways of avoiding estate taxes on death besides the exemption, including irrevocable trusts and other tools.

By comparison, in Canada most unrealized income (i.e., capital gains from investments, 2nd homes, etc.) is taxed upon death on the final income tax return of the decedent. Assets are assumed to have been sold upon death. About the only exemption is for a principal residence going to a spouse. I learned this by helping a friend who was the executor of a Canadian estate work with an attorney and CPA verified by Canadian tax research sources.

In the UK, the inheritance tax exemption is only £325,000. The excess is taxed at 40%.
https://www.gov.uk/inheritance-tax

While the portability provision is permanent, If Congress does not act, the exemption will revert to $5.49 million (adjusted for inflation) and twice that for a surviving spouse if a portability exemption was timely filed. Whoever controls Congress in 2025 could reduce or increase the exemptions starting in 2026. For 2022 the exemption was $12.06 million or $24.12 million joint. It adjusts annually based on inflation. For 2023 it is $12.92m/25.84m).

For more technical details, see the Journal Of Accountancy (CPAs Journal) at
https://www.journalofaccountancy.com/news/2022/jul/estates-now-request-late-portability-election-relief-5-years.html