

Extension of Time to Elect Portability

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Estate Planning & Administration

Until recently, Revenue Procedure 2017-34 permitted an executor of an estate to make a portability-only election on or before the later of Jan. 1, 2018, or 2 years after the decedent's date of death. Effective July 8, 2022, the Department of the Treasury and the Internal Revenue Service issued Rev. Proc. 2022-32, which supersedes Rev. Proc. 2017-34 and extends the period within which the executor of an estate may make a portability election to no later than 5 years following the decedent's date of death. This is a welcome relief for many, but for the estate of a decedent who died before July 8, 2017, but missed the prior filing window under Rev. Proc. 2017-34, there is, unfortunately, no remedy under this revenue procedure.

And just a reminder: In addition to the above timing requirement, relief is available only for an estate that meets all the following requirements:

1. The decedent was survived by a spouse, died after Dec. 31, 2010, and was a citizen or resident of the United States on the date of death;
2. The executor is not required to file an estate tax return under §6018(a)
3. The executor did not file an estate tax return within the filing deadline; and
4. The executor otherwise satisfies all requirements of the instant Revenue Procedure.

If an estate of a decedent meets the foregoing qualifications, an executor must file a complete Form 706 within the prescribed 5-year grace period and write at the top of Form 706 that the return is "FILED PURSUANT TO REV. PROC. 2022-32 TO ELECT PORTABILITY UNDER §2010(c)(5)(A)." Once this is done, the portability-only return will be deemed timely filed.

There are two points of caution practitioners should keep in mind. First, if after a timely and otherwise proper filing it is determined that based on the size of the estate, the executor was required to file an estate tax return under §6018(a) (i.e., the decedent had a taxable estate for federal estate tax purposes), the grant of the extension is deemed null and void *ab initio*. Second, while a surviving spouse or his or her estate may take advantage of the extra time to elect portability, doing so will not extend the time by which the surviving spouse or his or her estate may make a claim for a refund pursuant to §6511(a) for overpayment of gift or estate tax. Thus, it is critical that a surviving spouse

or personal representative of an estate simultaneously assess any gift tax and/or estate tax paid after the decedent's passing to ensure the statute of limitations (generally 3 years from the time of filing or 2 years from the time the tax was paid, whichever period expires later) to claim a refund does not toll.

For the full Revenue Procedure, you can visit the Internal Revenue Service's website or access it here: <https://www.irs.gov/pub/irs-drop/rp-22-32.pdf>

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