

PORTABILITY- AN IMPORTANT ESTATE TAX CONCEPT

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STEVE McCARTHY
CPA, CFP®,
Owner and Principal
650 610-9540 x 303
steve@mamportfolios.com

“In many cases “portability” may be better than the use of a Bypass Trust to allow a married couple to double the amount they can leave to heirs without incurring estate tax.”

McCarthy Asset Management, Inc. is an independent, fee-only investment advisory firm that has been helping people invest wisely for over fifteen years. Our mission is to help you better understand and improve your financial situation. We specialize in Retirement Planning, Portfolio Management and Tax Planning.



(Originally Published in March 2016 Monthly Commentary/Q1 Letter)

A common estate planning goal of a married couple is to take full advantage of both spouses' estate tax exclusion. This allows them to leave twice as much to their heirs free of estate tax. Typically, this is done by funding a Bypass Trust at the death of the first-to-die with the exclusion amount and leaving the rest to one's spouse (outright or in trust). There is a relatively new estate planning strategy called “Portability” that in many cases may be better than the use of a Bypass Trust.



Portability and DSUE

- What are the Requirements for the DSUE
 - Married Couples or widowed
 - Singles are not impacted
- Mechanics of DSUE
 - Must be married at time of death
 - Both spouses are US citizens
 - Death after Jan 1, 2011
 - DSUE allocation is made to surviving Spouse
 - Timely filed election is made on the estate tax return

“Portability” was first introduced into law on January 1, 2011. As a result of the passage of the 2012 Tax Act, portability is now permanent (subject, of course, to Congress later changing the law). What does portability do? Like the Bypass Trust, it allows the surviving spouse to utilize both spouses' estate tax exclusion. By electing portability, the decedent's unused exclusion (DSUE) (up to \$5.45 million in 2016) is transferred to the surviving spouse. *This could allow the surviving spouse to have close to \$11 million in assets and avoid gift or estate tax.* **An advantage of electing portability is that, unlike with assets in a Bypass Trust, assets subject to it receive a step-up in basis upon the death of the surviving spouse.**

In 2015, the Internal Revenue Service released final regulations on the estate tax portability election. **Importantly, in order for the surviving spouse to be able to use the DSUE amount (i.e. to elect portability), the executor of the first-to-die's estate must make an election on a timely-filed estate tax return.** This would necessitate the preparation and filing of an estate return just to make this election when a return might not otherwise be needed.

Some experts worry that executors will overlook the deadline to file an estate tax return, especially if an estate is smaller than the exemption and there is no reason to file an estate return other than electing portability. Not opting for portability can “short-change” the survivor and can put the executor at risk of being sued.

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The purpose of this article is to make you aware of what portability can do. Estate planning can be complicated, and involves more than just minimizing estate tax. *We recommend that you discuss with a knowledgeable estate planning attorney whether portability should be incorporated into your estate plan.*