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Guidance On Handling Basis Allocation For Deaths In 2010

-by Neil E. Harl*

On August 7, 2011, the Internal Revenue Service issued *Notice 2011-66*¹ and *Revenue Procedure 2011-41*,² both effective August 29, 2011, providing guidance on handling the determination of income tax basis for property owned (and passing from) decedents dying in 2010.³ The Tax Relief Act of 2010⁴ authorized an election for deaths in 2010 relative to income tax basis determination.⁵ The executor of the estate can choose (for property acquired from or passing from and owned by a decedent) to – (1) apply the estate tax rate and applicable credit amount for 2011 with a new basis at death (stepped up or down as the case may be), or (2) elect to apply the rules applicable to deaths in 2010 (no federal estate tax) and use the modified carryover basis rules applicable to deaths in 2010.⁶ These two authorities address the election option and provide additional and more detailed guidance beyond what was provided in the statute.

Section 1022 election

For a decedent who died in 2010, the election to make the “Section 1022” election is made by filing a Form 8939, Allocation of Increase in Basis for Property Acquired From a decedent, on or before November 15, 2011.⁷ Once made, the election is irrevocable with minor exceptions.⁸ Prior filings purporting to make the Section 1022 election *must be replaced with a timely filed Form 8939*.⁹

Method to allocate basis

The basis increase must be made on a timely-filed Form 8939, as noted. If an executor has been appointed, has qualified and is acting in that capacity, the Internal Revenue Service will accept Forms 8939 only from that executor. If an executor has not been appointed, any person in actual or constructive possession of property acquired from the decedent can file a Form 8939 for the property he or she actually or constructively possesses.¹⁰

If the executor makes the Section 1022 election, the executor must report and value all property (excluding cash and items of income in respect of decedent).¹¹ The executor must report all appreciated property included on a Form 709 (Federal Gift Tax Return) within the past three years (except for property transferred to the decedent by the spouse who had not acquired the property within the past three years).¹²

Within 30 days after filing a timely Form 8939, the executor is required to provide a statement to each recipient acquiring property reported on the form.¹³

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Extensions

No extensions to file a Form 8839 will be granted and IRS will not accept Forms 8939 after the due date except for conflicting filings.¹⁴

Relief provisions

Four categories of relief are authorized –

- An amended Form 8939 may be filed after the due date for the sole purpose of allocating a spousal property basis increase if timely filed originally and if done within 90 days after the date of distribution of the qualified spousal property to which the spousal property basis increase is allocated.
- An executor can file an amended Form 8939 (if originally timely filed) under the provisions of *Treas. Reg. § 301.9100-2(b)* on or before May 15, 2012 for any purpose except to make or revoke an election under Section 1022.
- An executor may apply for relief to supplement a timely-filed Form 8939 under *Treas. Reg. § 301.9100-3* to deal with a basis increase that had not been previously allocated if – (1) additional property is discovered or (2) the fair market value of the property is adjusted by the IRS.
- Relief can be requested under *Treas. Reg. § 301.9100-3* for an extension of time to file Form 8939 if the requirements of that regulation are satisfied.¹⁵

Generation-skipping transfer tax

The Notice acknowledges that the generation-skipping transfer tax was retroactively reinstated by the 2010 Act and applies to estates of all decedents who died after December 31, 2009 regardless of whether a Section 1022 election is made.¹⁶ The GST tax is computed by multiplying the taxable amount by the applicable rate.¹⁷ Section 302(c) of the 2010 Tax Relief Act provides that, for each generation skip occurring in 2010, the applicable rate is zero. The only way to achieve a zero inclusion rate is to make a timely allocation of the GST exemption to the transfer.¹⁸ The GST exemption amount equals the applicable exclusion amount for federal estate tax purposes.¹⁹

The Notice²⁰ states that if the executor of an estate where the decedent died in 2010 makes the Section 1022 election, the executor is to allocate that decedent's available GST exemption by attaching Schedule R of Form 8939 to the Form 8939 for that estate. If timely filed, that will be considered a timely allocation of the decedent's GST exemption.²¹

For *inter vivos* direct skips that occurred in 2010, if the donor wishes to pay GST tax at the rate of zero percent and not allocate any GST exemption to that transfer, the donor may elect out of the automatic allocation of GST exemption to that direct skip in one of two ways – (1) on a Form 709, Federal Gift Tax Form, timely filed,²² or (2) by paying the tax at the zero percent.

For GST returns for transfers made after December 31, 2009, and *before* December 17, 2010, the filing date is September 17, 2011 (September 19 because September 17 is a Saturday). For a Form 709 that does not report a GST transfer (or reports

a transfer on or after December 17, 2010 through December 31, 2010), the due date is not extended and is still April 18, 2011.

For qualified revocable trusts,²³ if the executor makes a Section 1022 election, the “applicable date” which governs the time period that a trust and estate can be taxed as one entity where no federal estate tax return was required²⁴ is two years after the decedent's death.

The “safe harbor”

Accompanying *Notice 2011-66*,²⁵ was *Revenue Procedure 2011-41*²⁶ which provides for a safe harbor for all those who make a Section 1022 election with the income tax basis determined under Section 1022 and not Section 1014. If the rules in Section 4 of the *Revenue Procedure* are followed, IRS will not challenge what has been done.²⁷ That set of rules will be discussed in the next issue of the *Digest*.

ENDNOTES

¹ 2011-2 C.B. ___.

² 2011-2 C.B. ___.

³ I.R.C. § 1022. See Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. No. 111-312, 124 Stat. 3296 (2010). See generally 5 Harl, *Agricultural Law* § 43.01[3][b][iv] (2011); Harl, *Agricultural Law Manual* § 5.04 (2011); 1 Harl, *Farm Income Tax Manual* § 3.20[4][1][F][I][BB] (2011 ed.). See also Harl, “The Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010,” 22 *Agric. L. Dig.* 1 (2011).

⁴ See note 3 *supra*.

⁵ Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. No. 111-312, 124 Stat. 3296 (2010).

⁶ *Id.* See I.R.C. § 1022.

⁷ Notice 2011-66, 2011-2 C.B. ___.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ I.R.C. § 2602.

¹⁸ *Id.* See I.R.C. § 2631(a).

¹⁹ I.R.C. § 2631(c).

²⁰ Notice 2011-66, 2011-2 C.B. ___.

²¹ *Id.*

²² See *Treas. Reg. § 26.2632-1(b)(1)(i)*.

²³ I.R.C. § 645; *Treas. Reg. § 1.645-1*.

²⁴ I.R.C. § 645(b)(2)(A).

²⁵ 2011-2 C.B. ___.

²⁶ 2011-2 C.B. ___.

²⁷ *Rev. Proc. 2011-41*, 2011-2 C.B. ___.