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More Guidance for Those Dying in 2010

-by Neil E. Harl*

The 350-day period during which the federal estate tax was repealed, from January 1, 2010 through December 16, 2010, has ended up causing no end of questions about how the period is to be handled, particularly with respect to the income tax basis for property passing from decedents dying in 2010.¹ In addition to a series of IRS publications in August and September of 2011,² a Form 706 (for use just for decedents dying in 2010) has been issued and a new form for handling the basis adjustments (for those electing to use the carryover basis option for 2010 deaths), Form 8939, has been issued followed by publication of the instructions for that form which have provided additional guidance on the option of electing a carryover basis for assets owned by and acquired from 2010 decedents.

This article focuses primarily on the guidance provided by the instructions to Form 8939.

Filing the Form 8939

Congress gave those dying in 2010 a choice in how the income tax basis could be handled for property owned by and acquired from 2010 decedents. One option was to apply the federal estate tax rate and applicable credit amount in effect for deaths *in 2011* with a new income tax basis at death (stepped up or down as the case may be) equal to fair market value as of the date of death or the alternate valuation date. In addition, an *election* was provided to apply the estate tax rules for 2010 deaths (no federal estate tax) and use the modified carryover basis rules applicable to deaths in 2010.³ This elective option was originally enacted in 2001 as the standard way to handle carryover basis after the repeal of the federal estate tax after December 31, 2009.⁴

Form 8939, *Allocation of Increase in Basis for Property Acquired From a Decedent*, has been issued to provide a means by which basis adjustments could be made and reported to the Internal Revenue Service and to the recipients acquiring property reported on the form.⁵ The form, for the estates of decedents dying in 2010, is required to be filed on or before January 17, 2012.⁶

For individuals serving in the Armed Forces of the United States, or serving in support of the Armed Forces, the deadline has been extended.⁷ That section authorizes, for example, an extension for the period of service in a specified area or zone related to combat and 180 days thereafter.

The Form 8939 is to be filed with –
 Internal Revenue Service
 Estate & Gift Tax Stop 824G
 201 W. Rivercenter Blvd.
 Covington, Kentucky 41011

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The instructions make it clear that the Form 8939 is *not to be filed with the decedent's final income tax return.*

Required attachments to the Form 8939

The Form 8939 instructions specify that several items are to be attached to the Form 8939 --

- The decedent's death certificate
- A certified copy of the will if the decedent died testate or an explanation of why it is not certified
- Any trust instrument or trust instruments
- A certified copy of the executor's authority to act, if an executor is appointed
- Copies of property appraisals

The instructions state that, if there is no executor or administrator appointed, then any person ". . . in actual or constructive possession of any property of the decedent" is to serve in that capacity.

Aggregate basis increase

The statute authorizes an aggregate basis increase for an estate of \$1,300,000⁸ and a spousal property basis increase of \$3,000,000.⁹ For a decedent who is neither a resident nor a citizen of the United States, the aggregate basis increase is \$60,000 which is in lieu of the \$1,300,000 figure¹⁰ and the aggregate basis increase is not increased further by unused built-in losses and loss carryovers.¹¹ The instructions point out that the adjustments in basis cannot exceed the fair market value for the property. Moreover, the basis increase may not be allocated separately to a life estate and remainder interest in the same property.

The instructions note that a net operating loss arising in the decedent's final tax year must be carried back and used in the applicable two-year, three-year, five-year or 10-year carryback period unless the carryback period is waived on the decedent's final income tax return by attaching a statement showing that the carryback period is waived.

As has been made clear by the statute,¹² the carryover basis option does not apply to property that constitutes a right to receive an item of income-in-respect-of-decedent.¹³ IRD property does not have to be listed on the Form 8939.

ENDNOTES

¹ See the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. No. 2010-312, 124 Stat. 3296 (2010). See also Notice 2011-66, 2011-2 C.B. 184; Rev. Proc. 2011-41, 2011-2 C.B. 188; Notice 2011-76, 2011-2 C.B. 479.

² See note 1.

³ I.R.C. § 1022(a).

⁴ Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, 115 Stat. 41 (2001).

⁵ See Notice 2011-66, 2011-2 C.B. 184.

⁶ See Notice 2011-76, 2011-2 C.B. 479. The due date for the

form was originally set for November 15, 2011 but the filing due date was extended to January 17, 2012.

⁷ I.R.C. § 7508(b).

⁸ I.R.C. § 1022(b)(2)(B).

⁹ I.R.C. § 1022(c)(2)(B).

¹⁰ I.R.C. § 1022(b)(3)(A).

¹¹ I.R.C. § 1022(b)(2)(3)(B).

¹² I.R.C. § 1022(f).

¹³ See I.R.C. § 691.

FARM INCOME TAX, ESTATE AND BUSINESS PLANNING SEMINARS

by Neil E. Harl

January 16-20, 2012 (tentative)

Kailua-Kona, Big Island, Hawai'i.

We would like to see if there is any more interest in a five-day agricultural tax seminar in Hawaii. If you are interested in attending the seminar, please send an e-mail to Robert@agrilawpress.com or letter to Agricultural Law Press, 127 Young Rd., Kelso, WA 98626 by November 15, 2011. If a sufficient number of people express an interest, we will contact all interested persons and make facility arrangements for the seminars in mid-November 2011.

Seminar sessions run from 8:00 a.m. to 12:00 p.m. each day, Monday through Friday, with a continental breakfast and break refreshments included in the registration fee. Each participant will receive a copy of Dr. Harl's 400+ page seminar manual *Farm Income Tax: Annotated Materials* and the 600+ page seminar manual, *Farm Estate and Business Planning: Annotated Materials*, both of which will be updated just prior to the seminar. The seminar registration fee is \$645 for current subscribers to the *Agricultural Law Digest*, the *Agricultural Law Manual* or the *Principles of Agricultural Law*. The registration fee for nonsubscribers is \$695. For more information call Robert Achenbach at 360-200-5666 or e-mail at robert@agrilawpress.com.