

More Guidance On Electing Out Of Estate Tax For 2010 Decedents

THURSDAY, AUGUST 11, 2011

The IRS has issued detailed guidance regarding estates of 2010 decedents that elect out of federal estate tax. The guidance has lots of details, and should be reviewed by any persons involved with the estates of decedents that died in 2010.

While not intended as a comprehensive analysis of the new guidance, some highlights and interesting points follow:

1. Form 8939 will be used to opt-out of estate tax (the Section 1022 election), and to allocate available basis step-up among eligible assets.
2. Form 8939 is due no later than November 15, 2011. Since the form is not out yet, estates should start gathering information now. There are only limited circumstances for an extension or a later amendment.
3. A conditional Form 8939 (one that is effective only if assets exceed the remaining unified credit amount of the decedent) is not allowed.
4. If the Section 1022 election is made, the decedent's GST exemption is allocated by attaching Schedule R to the Form 8939. For decedents that made a 2010 inter vivos gift, the Form 8939 is not used to elect out of the automatic allocation of GST exemption. If the gift was made before December 17, 2010, the time for filing a Form 709 with the election out is extended to September 19, 2011. If the gift was on or after December 17, the regular 2010 Form 709 filing dates apply.
5. Note that the Form 8939 must report ALL of the decedent's assets, not just those for which a basis step-up allocation applies (except for cash and IRD items, and noncitizens who are nonresidents only report U.S. assets). The form must also report

property that was required to be included on another donor's Form 709 if gifted to the decedent within 3 years of his or her death.

6. The executor must provide a statement to each recipient of property acquired from the decedent within 30 days of the filing of the Form 8939.

7. If the decedent creates separate interests in an item of property (such as a life estate and remainder), the basis interest must be allocated to all such separate interests if an allocation to any portion is desired.

If the opt-out election is not filed, the estate must file a Form 706, unless the assets of the decedent total less than the decedent's available unified credit amount. Those estates that do not file a Form 706 because the value of its assets do not require one and for which an opt-out election does not make sense should NOT file a Form 8939 since this could act to reduce the available amount available to step-up the basis in the decedent's assets.

Notice 2011-66 and Revenue Procedure 2011-41

Authored by Charles Rubin, Esq. Mr. Rubin is a Florida Bar Board Certified tax attorney with the firm of Gutter Chaves Josepher Rubin Forman Fleisher P.A. (www.floridatix.com) His practice focuses on protecting & enhancing individual, family & business wealth through: Planning to Minimize Taxes (U.S. & International) • Estate Planning, Charitable, Marital & Succession Planning • Business Structuring & Transactions • Trusts & Estates (Administration-Disputes-Drafting) • Creditor Protection. He can be reached at 561-998-7847 or at crubin@floridatix.com. This article was previously published at <http://www.rubinontax.blogspot.com>.