

IRS RESOLVES (SOMEWHAT) THE FILING DEADLINE OF THE ELECTION OUT OF FEDERAL ESTATE TAX FOR 2010 DECEDENTS

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Prior to the enactment of the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 ("TRA 2010"), the estates of persons dying in 2010 were exempted from federal estate tax, and were subject to a restrictive basis step-up regime. TRA 2010 reversed this and reimposed federal estate taxes for such decedents, but Section 301(c) of the Act allows estates of such persons to *elect* out of federal estate tax with the application of the original restrictive basis step-up regime.

The deadline for making such an election has been subject to some head scratching by practitioners. Section 301(c) of the Act is fairly clear that persons making this election are not required to file a federal estate tax return or pay federal estate tax until 9 months after the enactment date of the Act (effectively, until September 17, 2011, but since that is a Saturday, then September 19, 2011). What is unclear is when the election out of estate tax needs to be filed.

Under the law in effect prior to TRA 2010, an estate of a 2010 decedent had until the due date of the decedent's income tax return (usually, April 17, 2011), to make basis allocations required or permitted under the restrictive basis step-up regime. The IRS had gone so far as to prepare and release a draft Form 8939 for such purposes prior to TRA 2010. Thus, there has been concern that this April 17, 2011 deadline may apply to the new election out of estate tax, or perhaps even a deadline relating to the normal 9 month from death deadline for filing a Form 706.

The language of Section 301(c) of the Act provides that the election out of estate tax "shall be made at such time and in such manner as the Secretary of the Treasury or the Secretary's delegate shall provide." No such pronouncements have yet been made (subject to the website information discussed below). Some practitioners have interpreted Section 301(d)(A) of the Act, by its reference to Code Section 6018, as imposing the September 19, 2011 (9 months from date of enactment) deadline for the election out of estate tax. This is because under Section 6018 as applicable to persons electing out of estate tax (that is, applying Section 6018 as it applied to 2010 decedents before the changes of the TRA 2010), Section 6018 provided for the reporting and allocation of basis under the restrictive basis step-up regime. Since Section 6018 thus applies to the Form 8939 reporting, and since the election out of estate tax is assumed to be made through the filing of a Form 8939, the theory is that the election out of estate tax is thus not due until September 19, 2011. This may be a fair interpretation, but it is not without doubt. For example, pre-TRA 2010 Section 6018 specifically only related to reporting regarding 2010 decedents - it did not address any specific election out of estate tax (since of course, no such election existed prior to TRA 2010). Thus, the reference to it in Act Section 301(d)(1)(A) may not be sufficient to trigger the September 19, 2011 date of election out of estate tax (as opposed to the deadline for information reporting regarding basis and adjustments to basis that will arise out of such an election out of estate tax).

The IRS has now published additional information on its website that somewhat resolves these issues. This information is published at <http://www.irs.gov/pub/irs-pdf/f8939.pdf> and was posted on February 16, 2011. Some things are fairly clear from the website information, and some things are not.

As far as what is clear:

- a. The Form 8939 for allocating basis increases is not yet finalized, nor are the instructions for the Form or Publication 4895, Tax Treatment of Property Acquired From a Decedent Dying in 2010 which will presumably also address some of these issues.

b. The due date of the Form 8939 will be at least 90 days after the Form 8939 is finalized.

c. Instructions for how to elect to have the modified carryover basis rules apply will be included with the final Form 8939 and Publication 4895.

Some reasonable extrapolations from those items are:

a. The election out of estate tax will probably be made on or by reason of filing the Form 8939. However, it is possible that some other election method or form could be required, since the website information provides only that instructions for the Section 301(c) election will be included on the Form, not that the election itself would be on the Form. That is, the Form may still be limited to reporting of information and basis, with the election itself being made in some other manner.

b. The April 17, 2011 filing deadline for election out of estate tax should be a dead issue. Since the due date of the Form 8939 is at least 90 days after the Form 8939 is finalized, and we are closer than 90 days to April 17, the April 17 deadline should not apply. One could argue that if the election out of estate tax is to be done separately from the Form 8939 reporting then the election out and the Form 8939 may have different filing deadlines and thus this 90 day minimum may not apply to the election itself but only to the Form 8939 filing - but this appears unlikely.

c. For the same reason, the earliest deadline for electing out of estate tax should be 90 days from the date the Form 8939 is finalized.

One thing that the website information does not resolve is whether the election out of estate tax deadline is being interpreted by the IRS as not arising under TRA 2010 in any event before September 19, 2011. Thus, for example, the language of the website information does not appear to preclude an IRS interpretation that if it finalizes the Form 8939 on April 1, 2011 that the filing deadline could be set on or around July 1, 2011 (i.e., 90 days after finalization). Some further guidance or refinement of the website information in this regard would be helpful to all - otherwise, practitioners will

need to watch for the final Form 8939 to determine if a filing deadline prior to September 19 may still be imposed.

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