

August 11, 2011

Dear Reader,

The blogs at Forbes have a new design and some issues are being worked out, such as formatting of tables. Please be patient.

There were many useful links in my latest blog post, [Tax Deadlines For 2010 Deaths? IRS Finally Issues Guidance](#). I got feedback that the tables have become difficult to read, which is why I am providing this document.

Thank you for reading my blog posts and for supporting and encouraging my blogging efforts. Please let me know how I can make my blog more useful to you.

Best,

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Tax Deadlines For 2010 Deaths? IRS Finally Issues Guidance

By HANI SARJI

On August 5, 2011, the IRS published long-awaited guidance for executors of estates of people who died in 2010. [Notice 2011-66](#) explains how these executors can opt out of the estate tax, and [Revenue Procedure 2011-41](#) explains the special tax rules that apply to assets when executors opt out of the estate tax.

The estate tax and the generation-skipping transfer (GST) tax were repealed on January 1, 2010; but on December 17, 2010, President Obama [signed a law](#) that reinstated them retroactive to January 1, 2010.

This law gave people who died in 2010 a special tax break: executors of 2010 decedents can opt out of the default estate tax regime. The estate tax rate in 2010 was set at 35% and the exemption was \$5 million. The estate tax regime has one benefit: assets received from a decedent are generally stepped-up to fair market value under [Internal Revenue Code § 1014](#).

To remain in the estate tax regime, executors file the form they always filed for taxable estates: Form 706, United States Estate (and Generation-Skipping Transfer) Tax Return. On August 1, 2011, the IRS published [draft instructions for form 706](#). These instructions inform that for decedent's dying after December 31, 2009 and before December 17, 2010, the due date for Form 706 is September 19, 2011.

Executors of 2010 decedents can opt out of the estate tax regime by filing a special form: Form 8939, Allocation of Increase in Basis for Property Acquired From a Decedent.

Opting out of the estate tax regime also means opting out of the stepped-up basis rule under IRC § 1014 and opting into the modified carryover basis rule under [IRC § 1022](#).

Carryover basis generally means that assets keep the same basis – the basis in the hands of the decedent “carries over” to the recipient. (Note, however, that when basis is greater than fair market value, the basis in the hands of the recipient is limited to that fair market value.)

IRC § 1022 modifies this carryover basis rule because it allows executors to step-up the basis of some assets. Executors can allocate a \$1.3 million step-up in basis to assets passing to any person. Executors can allocate an additional \$3 million step-up in basis to assets passing either in trust or outright to a surviving spouse. In [Revenue Procedure 2011-41](#), the IRS provides a safe harbor for making these basis allocations.

The IRS [estimates](#) “that 7,000 executors of estates who died in 2010 will make the Section 1022 Election and thus will be required to file Form 8939, and that it will take approximately 8 hours to prepare the documentation.”

The guidance published by the IRS on August 5, 2011 also answers questions that executors and practitioners have about the GST tax in 2010.

In 2010, the GST tax was also repealed. The December 17, 2010 law reinstated this tax retroactive to January 1, 2010.

The new law gave wealthy taxpayers another tremendous tax break. The GST tax exemption in 2010 was set at \$5 million. But the GST tax rate was an unbeatable 0%. Wealthy taxpayers had a brief opportunity to take advantage of this 0% tax break. For more on that rare opportunity, see my earlier post, [Congress’ Gift To The Wealthy, A GST Tax “Holiday” In 2010 – Act Before The New Year!](#)

In its helpful guidance, the IRS answered pressing questions that were left open in the December 2010 law. Here are some important highlights:

1. To elect out of the estate tax, executors must file Form 8939. They should not file Form 706 along with Form 8939. The IRS will send a letter to executors who file both forms and provide them 90 days to correct their mistake by filing either a restated Form 8939 or Form 706. ([Notice 2011-66](#))
2. Form 8939 is due on or before November 15, 2011. ([Notice 2011-66](#))
3. The IRS provided a safe harbor for executors electing out of the estate tax and allocating the increase of basis under IRC § 1022. ([Revenue Procedure 2011-41](#))
4. For executors choosing to remain in the estate tax regime, Form 706 is generally due within 9 months after a decedent's death. But for decedents dying after December 31, 2009 and before December 17, 2010, the due date for Form 706 is September 19, 2011. ([Draft instructions for Form 706](#))
5. Certain generation-skipping transfers were tax free in 2010, but Form 709—United States Gift (and Generation-Skipping Transfer) Tax Return—still has to be filed: “the IRS will interpret the reporting of an inter vivos direct skip not in trust occurring in 2010 on a timely filed Form 709 as constituting the payment of tax (at the rate of zero percent) and therefore as an election out of the automatic allocation of GST exemption to that direct skip.” ([Notice 2011-66](#))

Executors of 2010 decedents are still waiting for final forms and instructions. In [IR-2011-83](#), the IRS stated that the final draft of the form to elect out of the estate tax and the related instructions will be available “early this fall.”

The following table aggregates helpful links and information for executors of 2010 decedents:

	Default Estate Tax Regime	Modified Carryover Basis
Form	<ul style="list-style-type: none"> - Form 706, United States Estate (and Generation-Skipping Transfer) Tax Return (Latest draft: 6/16/2011) - Form 706-NA, United States Estate (and Generation-Skipping Transfer) Tax Return for Estate of Nonresident Not a Citizen of the U.S. (Latest draft: 8/3/2011) 	Form 8939, Allocation of Increase in Basis for Property Acquired From a Decedent (Latest draft: 12/16/2010)
Instructions	<ul style="list-style-type: none"> - Form 706: draft instructions, 8/1/2011 - Form 706-NA: draft instructions, 8/1/2011 	Forthcoming. IR-2011-83 states that Form 8939 and the related instructions will be available "early this fall."
Form is due on . . .	Form 706 is generally due within 9 months after a decedent's death. But for decedents dying after December 31, 2009 and before December 17, 2010, the due date for Form 706 is September 19, 2011. (Draft instructions for Form 706)	On or before November 15, 2011 (Notice 2011-66)
Estate tax exemption	\$5 million	NA
Estate tax rate	35%	NA
Bases of assets received from decedent	step up or step down to fair market value (IRC § 1014)	modified carryover basis (which allows the executor to allocate a \$1.3M basis increase to assets passing to any person, and an additional \$3M to assets passing directly or in trust to a surviving spouse) (IRC § 1022)
IRS Guidance	<ul style="list-style-type: none"> - Estate Tax (Updated March 25, 2011) - Filing Estate and Gift Tax Returns (Updated March 16, 2011) - Forms and Publications – Estate and Gift Tax (Updated March 16, 2011) - Frequently Asked Questions on Estate Taxes (Updated March 16, 2011) - Publication 559 (2010), Survivors, Executors, and Administrators (HTML, PDF) - Special Rules for Estates of Decedents Dying in 2010 (Note on Aug. 9, 2011: "This page is being updated. Please check back later.") - What's New – Estate and Gift Tax (Updated July 19, 2011) 	<ul style="list-style-type: none"> - IR-2011-83, Aug. 5, 2011 <ul style="list-style-type: none"> - announcing the Nov. 15, 2011 due date, and linking to Notice 2011-66, Rev. Proc. 2011-41. - Notice 2011-66, Aug. 5, 2011 <ul style="list-style-type: none"> - provides the due date of Form 8939 - provides how the executor of a 2010 decedent can opt out of the estate tax - addresses how a donor may elect out of the automatic allocation of the GST tax exemption for 2010 direct skips - clarifies the due date for returns for the taxable year ending December 31, 2010 that report GST exemption or that opt out of the automatic allocation of GST exemption - discusses the application of chapter 13 (the GST tax) to testamentary transfers during 2010 - Revenue Procedure 2011-41 <ul style="list-style-type: none"> - provides a safe harbor for allocating basis under IRC § 1022 - provides a thorough discussion of the modified carryover basis rules under § 1022, and provides some examples

The following is a timeline of developments relevant to executors of 2010 decedents:

2001-06-07	- President George W. Bush signed into law the Economic Growth and Tax Relief Reconciliation Act of 2001, P.L. 107-16 (EGTRRA), repealing the estate tax in 2010
2010-12-16	- Draft Form 8939
2010-12-17	- President Obama signed into law The Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, P.L. 111-312 (2010 Tax Relief Act) - IRS spokesman Eric Smith told BNA that the December 16, 2010 draft of Form 8939 does not reflect estate tax changes made in 2010 Tax Relief Act. Smith observed that the draft form does not include the executor's choice to apply carryover basis or the estate for decedents in 2010. Guidance published by the IRS on Aug. 5, 2011 indicates that the filing of Form 8939 secures the election out of the estate tax. Executors and practitioners are still waiting for a final draft of Form 8939.
2011-01-31	- Letter on Draft Form 8939 , American Bar Association Section of Real Property Trust & Estate Law
2011-03-31	- IR-2011-33 , announcing "that Form 8939 is not due on April 18, 2011, and should not be filed with the final Form 1040 of persons who died in 2010." (This due date was clarified in IRS guidance published on Aug. 5, 2011. The due date for Form 8939 is Nov. 15, 2011.)
2011-06-22	- Letter on Draft Form 8939 & Certain GST in 2010 , New York State Bar Association
2011-08-01	- Draft instructions: Form 706 - Draft instructions: Form 706-NA
2011-08-03	- Draft Form 706-NA
2011-08-05	IRS published guidance for executors of 2010 decedents: - IR-2011-83 – Announcing the 11/15/2011 due date for Form 8939 - Notice 2011-66 - Revenue Procedure 2011-41
2011-Fall*	-IRS indicated it will provide final draft of Form 8939 and the related instructions (see IR-2011-83)
2011-09-19*	-Form 706 is due for decedents dying after December 31, 2009 and before December 17, 2010 (Draft instructions for Form 706)
2011-11-15*	-Form 8939 is due, if the executor is electing out of the estate tax

* prospective dates