

Optional estate tax for 2010

Remember the year without estate taxes? It was 2010, the final year of a series of phased-in adjustments to the federal estate tax begun in 2001. For the next nine years, most observers expected Congress to change course before the one-year lapse of the estate tax. But Congress waited until December 2010 to come up with the estate tax regime that applies now. The federal estate tax was restored retroactively to January 1, 2010, with a \$5 million exempt amount. Perhaps to avoid a constitutional challenge to the retroactivity provisions, Congress included a choice for the estates of 2010 decedents. They may opt out of the estate tax, and into the carryover basis regime.

How does one do that? By filing Form 8939. IRS released guidance on that Form in August.

Estates of billionaire 2010 decedents almost certainly will want to file Form 8939, and estates smaller than \$5 million will not. Estates under \$5 million won't have to pay federal estate tax, and they still will get full basis step-ups for estate assets. The answer will be less obvious for estates larger than \$5 million but smaller than perhaps \$20 million or so. Evaluation by an estate planning professional will be needed. The IRS expects that 7,000 estates will be filing Form 8939. Oddly, the Service predicts that filing the Form should take the executor only 10 hours!

Absolute deadline

Form 8939 for 2010 decedents *must* be filed on or before November 15, 2011. If it is filed early, a Form 8939 may be amended or revoked, but only through the filing of a subsequent Form 8939 before the November 15 cutoff. There will be no extensions of time for this filing. The election becomes irrevocable on November 15. Taxpayers are *not* permitted to file an estate tax return plus a conditional Form 8939, to take effect only in the event that an estate tax audit results in the value of a taxable estate going above the applicable exclusion amount.

Given that the IRS took more than seven months to release the Form, allowing taxpayers just over three months for compliance may seem a bit out of balance. However, in most cases the decedent has been dead for more than a year, and the executor and tax advisors have been waiting for this development.

Relief will be available in limited circumstances for amending a timely filed Form 8939. For example, if a timely filed Form 8939 was complete, except that it failed to allocate the full \$3 million basis step-up allowed for property passing to a surviving spouse, an amended form making that allocation will be accepted.

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