

Part III - Administrative, Procedural, and Miscellaneous

Method for Making Election to Apply Carryover Basis Treatment under Section 1022 to the Estates of Decedents who Died in 2010 and Rules Applicable to Inter Vivos and Testamentary Generation-Skipping Transfers in 2010

Notice 2011-66

PURPOSE

This notice provides guidance with regard to the time and manner in which the executor of the estate of a decedent who died in 2010 elects, pursuant to section 301(c) of the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, P.L. 111-312 (124 Stat. 3296) (TRUIRJCA), to have the estate tax not apply and to have the carryover basis rules in section 1022 apply to property transferred as a result of the decedent's death. This notice also addresses how a donor may elect out of the automatic allocation of generation-skipping transfer (GST) tax exemption to direct skips occurring during 2010. It also clarifies the due dates for returns for the taxable year ending December 31, 2010, that report a generation-skipping transfer, that allocate GST exemption, or that opt out of the automatic allocation of GST exemption. In addition, the notice discusses the application of chapter 13 (the GST tax) to testamentary transfers during 2010. Finally, this notice addresses certain other collateral issues arising from the determination of basis under section 1022.

This notice applies to executors of the estates of decedents who died in 2010 and to recipients of property acquired from such decedents (within the meaning of section 1022(e)) (hereinafter, *acquired from the decedent*), if the executors make the election under section 301(c) of TRUIRJCA. This notice also applies to donors who made a gift during 2010 that is a generation-skipping transfer or an indirect gift for purposes of the GST tax. See Revenue Procedure 2011-41 for a safe harbor with regard to the interpretation and application of section 1022.

BACKGROUND

Subtitle A of title V of the Economic Growth and Tax Relief Reconciliation Act of 2001, P.L. 107-16 (EGTRRA) enacted section 2210, which made chapter 11 (the estate tax) inapplicable to the estate of any decedent who died in 2010 and chapter 13 (the GST tax) inapplicable to generation-skipping transfers made in 2010. On December 17, 2010, TRUIRJCA became law, and section 301(a) of TRUIRJCA retroactively reinstated the estate and GST taxes. However, section 301(c) of TRUIRJCA allows the executor of the estate of a decedent who died in 2010 to elect to apply the Internal Revenue Code (IRC) as though section 301(a) of TRUIRJCA did not apply with respect to chapter 11 and with respect to property acquired or passing from the decedent (within the meaning of section 1014(b)). Thus, section 301(c) of TRUIRJCA allows the executor of the estate of a decedent who died in 2010 to elect not to have the provisions of chapter 11 apply to the decedent's estate, but rather, to have the provisions of section 1022 apply (Section 1022 Election).

Even though an executor may elect out of the estate tax under TRUIRJCA, the provisions of chapter 13 (GST tax) nonetheless continue to apply. Section 302(c) of TRUIRJCA, however, provides that the applicable tax rate for each GST occurring during 2010 is zero. Section 301(d)(2) provides that, in the case of any generation-skipping transfer made after December 31, 2009, and before December 17, 2010, the due date for filing a return required under section 2662 of the IRC (including any election required to be made on such return) shall not be earlier than September 17, 2011.

TRUIRJCA also retroactively repealed section 2511(c), which treated each transfer in trust during 2010 as a gift unless the trust was treated as wholly owned by the donor or the donor's spouse. Because of this retroactive repeal, this section does not apply even if a Section 1022 Election is made.

GUIDANCE

I Section 1022 Election and Filing Requirements.

A. Section 1022 Election.

The executor of the estate of a decedent who died in 2010 may make the Section 1022 Election by filing a Form 8939, Allocation of Increase in Basis for Property Acquired From a Decedent, on or before November 15, 2011. Once made, the election is irrevocable except as provided in section I.D.1 or D.2 of this notice. Prior filings purporting to make the Section 1022 Election must be replaced with a timely filed Form 8939.

If, for the same decedent, the Internal Revenue Service (IRS) receives a Form

8939 and either a Form 706, United States Estate (and Generation-Skipping Transfer) Tax Return, or a Form 706-NA, United States Estate (and Generation-Skipping Transfer) Tax Return Estate of Nonresident not a Citizen of the United States, the IRS will issue a letter to each person who filed such a form. The letter will include the name and address of each person who filed a Form 706 (or Form 706-NA) or a Form 8939 with respect to the decedent, and will explain that each of those persons must collectively sign and file either a restated Form 706 (or Form 706-NA) or Form 8939 on or before 90 days from the date the IRS mails such letters. If no restated Form 706 (or Form 706-NA) or Form 8939, signed by each person who previously filed any such form, is filed within that 90-day period, the IRS will determine whether the executor has made a Section 1022 Election for the decedent's estate or whether the decedent's estate is subject to chapter 11. In making this determination, the IRS will consider all relevant facts and circumstances disclosed to the IRS, including without limitation the relative total fair market values of the decedent's property in the possession of the executors and the nature and significance of the economic impact of the Section 1022 Election (or its loss) on the beneficial owners of the property held by each executor. Some factors may be more relevant, and may be accorded more weight, than others for any particular estate.

B. Method to Allocate Basis.

The executor must allocate Basis Increase, as defined in section 4.02 of Revenue Procedure 2011-41, on a timely filed Form 8939. For purposes of this section, references to the term "executor" shall be construed in accordance with section 2203 as

if that section was applicable. Accordingly, if an executor has been appointed, has qualified, and is acting for a decedent's estate within the United States, the IRS generally will only accept Forms 8939 filed by such executor.

If an executor has not been appointed, any person in actual or constructive possession of property acquired from the decedent may file a Form 8939 for the property he or she actually or constructively possesses. If the IRS receives multiple Forms 8939 that collectively purport to allocate Basis Increase in an amount greater than the amount of Basis Increase available to the estate, the IRS will issue a letter to each person who filed such a form. The letter will include the name and address of each other person who filed a Form 8939 with respect to the decedent, and will explain that each of those persons must collectively sign and file a single, restated Form 8939 allocating available Basis Increase in order to make the Section 1022 Election. The restated Form 8939 must be filed on or before 90 days from the date the IRS mails such letters. If no restated Form 8939, signed by each such person who previously submitted a Form 8939, is filed within that 90-day period, the IRS will allocate the available Basis Increase as the IRS, in its discretion, may determine. In making this determination and exercising its discretion, the IRS will consider all relevant facts and circumstances disclosed to the IRS. That allocation might be made on a pro-rata basis, based on the amount of unrecognized appreciation in the property owned by the decedent (within the meaning of section 1022(d)) (hereinafter, *owned by the decedent*) at death and acquired from the decedent that was reported on the timely filed Forms 8939, or in any other manner deemed appropriate for the particular decedent's estate

by the IRS in the exercise of its discretion.

The recipient's basis in a particular property (including the amount of Basis Increase allocated to that property) is subject to adjustment upon the examination by the IRS of any tax return reporting a value dependent upon the property's basis (for example, the property's depreciation, sale, or other disposition that triggers gain or loss on the property, or otherwise).

C. Reporting Requirements.

If the executor makes the Section 1022 Election, the executor must report and value on Form 8939 all property (excluding cash and property that constitutes the right to receive an item of income in respect of a decedent under section 691 (IRD)) acquired from the decedent. Section 6018(b)(1). In addition, the executor also must report all appreciated property acquired from the decedent, valued as of the decedent's date of death, that was required to be included on the donor's Form 709, United States Gift (and Generation-Skipping Transfer) Tax Return, if such property was acquired by the decedent by gift or by inter vivos transfer for less than adequate and full consideration in money or money's worth during the 3-year period ending on the date of the decedent's death. Section 6018(b)(2). This does not include property transferred to the decedent by the decedent's spouse, who had not acquired the property in whole or in part by gift or by inter vivos transfer for less than adequate and full consideration in money or money's worth during that same 3-year period.

In the case of a deceased nonresident who is not a citizen of the United States, the property to be reported is limited to tangible property situated in the United States

that is acquired from the decedent and any other property acquired from the decedent by a United States person. Section 6018 describes the information that must be provided on Form 8939.

In addition to the information as provided in this paragraph C, the executor must include with the Form 8939 any other information and supporting documentation as identified in the instructions to the Form 8939 or in any Internal Revenue Bulletin (see § 601.601(d)(2)(ii)(b)).

Within 30 days after the executor files a timely filed Form 8939, the executor (or each executor filing such a form) must provide a statement to each recipient acquiring property reported on that form, setting forth the information required under section 6018(c), regardless of whether the executor allocates Basis Increase to such property on the form. Section 6018(e). If an adjustment is made to the basis of property reported on a Form 8939, the executor must provide updated statements to each recipient of property affected by that adjustment within 30 days after making the adjustment or receiving notice of the adjustment from the IRS, whichever is applicable.

D. Time for Filing Return.

1. In General.

Form 8939 is due November 15, 2011. A Form 8939 filed prior to that date may be amended or revoked, but only on a subsequent Form 8939 filed on or before November 15, 2011. The Form 8939 that is timely filed by an executor is the last Form 8939 filed by that executor on or before November 15, 2011. No executor's Form 8939 will have any effect on any Form 8939 filed by a different executor. The IRS will not

grant extensions of time to file a Form 8939 and will not accept a Form 8939 or an amended Form 8939 filed after the due date, except as provided in section I.A or B (in the event of conflicting filings) or in section I.D.2 (regarding relief provisions) of this notice. Thus, a taxpayer may not file an estate tax return as well as a conditional Form 8939 that would take effect only if an estate tax audit results in an increase in the gross estate above the applicable exclusion amount. Notwithstanding the previous sentences, however, for persons qualifying under section 7508 or 7508A, the due date for filing a Form 8939 is postponed as provided in those sections. Any executor filing a Form 8939 after November 15, 2011, pursuant to section 7508 or 7508A should write "Filed Pursuant to Section 7508" or "Filed Pursuant to Section 7508A", as applicable, on the top of the form. The failure to write these notations at the top of the Form 8939, however, does not adversely impact the extension granted under section 7508 or 7508A. Furthermore, for decedents qualifying for relief under section 692, an executor must file a Form 8939 to make the Section 1022 Election.

2. Relief Provisions.

Four types of relief from the requirements of section I.D.1 of this notice are available. First, an amended Form 8939 may be filed after the due date of that form for the sole purpose of allocating Spousal Property Basis Increase, as that term is defined in section 1022(c)(2) and section 4.02(3) of Revenue Procedure 2011-41, among the property eligible to receive an allocation of that basis, provided that each of the two following requirements is satisfied. The first requirement is that the Form 8939 must have been timely filed and was complete when filed except for the allocation of the full

amount of the Spousal Property Basis Increase to the eligible property reported on that Form 8939. The second requirement is that each amended Form 8939 must be filed no more than 90 days after the date of the distribution of the qualified spousal property to which Spousal Property Basis Increase is allocated on that amended Form 8939.

Second, provided an executor timely filed a Form 8939, the executor may file an amended Form 8939 under the provisions of § 301.9100-2(b) on or before May 15, 2012, for any purpose except to make or revoke a Section 1022 Election. The executor must write "Filed Pursuant to Section 301.9100-2" on the top of the amended Form 8939.

Third, an executor may apply for relief to supplement a timely filed Form 8939 under § 301.9100-3. A request for relief to supplement a timely filed Form 8939 is limited to an extension of time to allocate any Basis Increase that has not previously been validly allocated, and such relief, if appropriate, will be granted only if: (1) after filing the Form 8939, the executor discovers additional property to which remaining Basis Increase could be allocated; and/or (2) the FMV of property reported on the Form 8939 is adjusted as the result of an IRS examination or inquiry. Relief will not be granted to reduce an allocation of Basis Increase made on a timely filed Form 8939.

Fourth, an executor may apply for relief under § 301.9100-3 in the form of an extension of the time in which to file the Form 8939 (thus, making the Section 1022 Election and the allocation of Basis Increase), which relief may be granted if the requirements of § 301.9100-3 are satisfied. Taxpayers should be aware, however, that, in this context, the amount of time that has elapsed since the decedent's death may

constitute a lack of reasonableness and good faith and/or prejudice to the interests of the government (for example, the use of hindsight to achieve a more favorable tax result and/or the lack of records available to establish what property was or was not owned by the decedent at death), which would prevent the grant of the requested relief.

II GST Tax in 2010.

A. With Respect to Decedents Who Died in 2010

The GST tax was retroactively reinstated by TRUIRJCA and applies to the estates of all decedents who died after December 31, 2009, regardless of whether a Section 1022 Election is made. The GST tax is computed by multiplying the taxable amount by the applicable rate. Section 2602. Section 2641(a) defines the applicable rate for this purpose as the maximum federal estate tax rate applicable to the estate of a decedent dying at the time of the transfer, multiplied by the inclusion ratio with respect to that transfer. Section 302(c) of TRUIRJCA provides that, for each GST occurring during 2010, the applicable rate under section 2641(a) is zero. This provision is interpreted to mean that the maximum federal estate tax rate for purposes of computing the GST tax on such a transfer is deemed to be zero which, when multiplied by any inclusion ratio, will result in an applicable rate of zero. As under the law applicable to GSTs occurring prior to 2010, the only way to achieve a zero inclusion ratio for the transfer is to make a timely allocation of GST exemption to the transfer.

If the executor of a decedent who died in 2010 makes the Section 1022 Election, the executor allocates that decedent's available GST exemption by attaching the Schedule R of Form 8939 to the Form 8939 for that decedent's estate. If the Form 8939

is timely filed, this allocation will be considered a timely allocation of the decedent's GST exemption under section 2632.

B. Inter Vivos Direct Skips

In the case of inter vivos direct skips that occurred in 2010, if the donor wishes to pay GST tax at the rate of zero percent and therefore does not wish to have any GST exemption allocated to that transfer, the donor may elect out of the automatic allocation of GST exemption to that direct skip in either of two ways. First, the donor affirmatively may elect out of the automatic allocation by describing, on a timely filed Form 709, both the transfer and the extent to which the automatic allocation is not to apply. See section 26.2632-1(b)(1)(i). Alternatively, that same regulation also provides that, “. . . a timely-filed Form 709 accompanied by payment of the GST tax (as shown on the return with respect to the direct skip) is sufficient to prevent an automatic allocation of GST exemption with respect to the transferred property.” Because it is clear that a 2010 transfer not in trust to a skip person is a direct skip to which the donor would never want to allocate GST exemption, 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. This interpretation also applies to a direct skip not in trust occurring at the close of an estate tax inclusion period (ETIP) in 2010 other than by reason of the donor's death. However, a donor may or may not want to allocate GST exemption to a 2010 direct skip made to a trust. Therefore, this interpretation will not apply to any transfer in trust that is a direct skip or that occurs at

the end of an ETIP. In addition, because this interpretation only applies to inter vivos direct skips, it will also not apply to any direct skip, or to the close of an ETIP, by reason of the donor's death. Section 26.2632-1(c)(4). The rules regarding the automatic allocation of GST exemption will apply to transfers described in the preceding sentence unless the transferor affirmatively elects to have those rules not apply.

C. Filing Deadlines

Section 2611(a) defines a GST transfer as a direct skip, a taxable distribution, or a taxable termination. An indirect skip, as defined in section 2632(c)(3), is not a GST transfer. Section 2631 provides that each individual is allowed a GST exemption amount which may be allocated to any property with respect to which such individual is the transferor. Under § 26.2632-1(b)(3) and (4), an election to treat a trust as a GST trust or to allocate GST exemption to any inter vivos transfer other than a direct skip, is made on a timely filed Form 709. Section 2632(b)(1) and (c)(1) provide that, if any individual makes a direct or indirect skip during life, any unused portion of such individual's GST exemption shall be allocated to the property transferred to the extent necessary to make the inclusion ratio for such property zero. Sections 2632(b)(3) and (c)(5) and § 26.2632-1(b)(1)(i) and (b)(2)(ii) provide that an individual may prevent the automatic allocation of GST exemption by so providing on a timely filed Form 709.

Section 301(d)(2) of TRUIRJCA extends the time for filing any return required under section 2662 (including any election required to be made on such return) to report a GST transfer made after December 31, 2009, and before December 17, 2010, to September 17, 2011. Accordingly, the due date for filing a return reporting a direct skip,

a taxable distribution, or a taxable termination (including any election required to be made on such return) that occurred on or after January 1, 2010, through December 16, 2010, is September 19, 2011, including extensions (because September 17, 2011, falls on a Saturday), except in the case of a Schedule R attached to Form 8939, which is due on or before November 15, 2011.

However, the language of Section 301(d)(2) of TRUIRJCA does not extend the due date of all gift and GST returns for 2010. Specifically, to the extent a return relates to an indirect skip, or to a post-December 16, 2010, direct skip, the due date of the return is not extended. Thus, the due date for filing a Form 709 that does not report a GST transfer or that reports a GST transfer (or any election pertaining to such transfer) that occurs on or after December 17, 2010, through December 31, 2010, was April 18, 2011, including extensions. In addition, the due date for filing a Form 709 to elect to treat a trust as a GST trust or to allocate GST exemption to a transfer occurring during 2010 under § 26.2632-1(b)(3) or (4) was April 18, 2011, including extensions. However, if a donor timely filed Form 709 for the taxable year ending December 31, 2010, but failed to allocate GST exemption to a transfer occurring during such year, see § 301.9100-2 for possible relief.

D. Application of Chapter 13 to Testamentary Transfers During 2010

For purposes of chapter 13, the Treasury Department and IRS will construe and apply any reference to chapter 11 without regard to whether the executor of a decedent who died in 2010 made a Section 1022 Election. For example, references to chapter 11 in §§ 2612(c)(1), 2642(b)(2)(A), 2642(f), 2651(e)(1)(B), and 2661(2) will be construed as

if the decedent was subject to chapter 11 even if the decedent's executor made the Section 1022 Election.

III Transfer Certificates Under § 20.6325-1

Section 6324(a)(1) generally provides that, unless the estate tax is paid in full, a lien is imposed upon the gross estate of a decedent for 10 years from the date of death for any unpaid estate tax liability. Section 6324(a)(2) generally provides that, if the estate tax is not paid when due, then (1) any transferee, trustee, person in possession of property, or person who receives property from the gross estate as described in sections 2034 to 2042 shall be personally liable for the estate tax to the extent of the value of that property on the decedent's date of death and (2) any part of any property included in the gross estate that is transferred by such person shall be divested of the lien and a like lien shall attach to all of the property of such person. Section 6325(c) and the regulations thereunder provide procedures for issuing a certificate of discharge of lien for any property subject to any lien imposed by section 6324.

In the case of a transfer agent holding property registered in the name of a nonresident decedent who is not a citizen of the United States, § 20.6325-1(a) provides that the IRS may issue a transfer certificate to permit the transfer of property without liability for such decedent's estate tax. Specifically--

[a] transfer certificate is a certificate permitting the transfer of property of a nonresident decedent without liability. . . . Corporations, transfer agents of domestic corporations, transfer agents of foreign corporations (except as to shares held in the name of a nonresident decedent not a citizen of the United States), banks, trust companies, or other custodians in actual or constructive possession of property, of such a decedent can insure avoidance of liability for taxes and penalties only by demanding and

receiving transfer certificates before transfer of property of nonresident decedents.

Thus, transfer certificates requested with respect to property of a nonresident decedent who is not a citizen of the United States have been issued by the IRS when the Commissioner has been satisfied that the “tax imposed upon the estate, if any, has been fully discharged or provided for.” Section 20.6325-1(c).

Concerns have been raised as to whether it is still necessary to obtain such transfer certificates prior to transferring property owned by nonresident decedents who are not citizens of the United States, who died in 2010, and whose executors make the Section 1022 Election. This notice clarifies that a transfer certificate is not required, and the IRS will not issue transfer certificates, with respect to the property of a nonresident decedent who is not a citizen of the United States, who died in 2010, and whose executor makes the Section 1022 Election.

IV Election to Treat a Trust as Part of an Estate Under Section 645

Under section 645, if the executor (if any) of an estate and the trustee of a qualified revocable trust so elect, the trust will be treated as part of the estate (and not as a separate trust) for income tax purposes for all taxable years of the estate ending after the date of the decedent’s death and before the applicable date. Section 645(b)(2) defines “applicable date” as, “(A) if no return of tax imposed by chapter 11 is required to be filed, the date which is 2 years after the date of the decedent’s death, and (B) if such a return is required to be filed, the date which is 6 months after the date of the final determination of the liability for tax imposed by chapter 11.” If an executor makes the Section 1022 Election, no return of tax imposed by chapter 11 is required to be filed.

Accordingly, if an executor makes the Section 1022 Election, section 645(b)(2)(A) applies and the applicable date is the date that is 2 years after the date of the decedent's death.

REQUEST FOR COMMENTS

The Treasury Department and the IRS invite public comments on the guidance provided in this notice. All materials submitted will be available for public inspection and copying.

Comments may be submitted to Internal Revenue Service, CC:PA:LPD:PR (Notice 2011-66), Room 5203, PO Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may also be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to the Couriers Desk at 1111 Constitution Avenue, NW, Washington, DC 20224, Attn:CC:PA:LPD:PR (Notice 2011-66), Room 5203. Submissions may also be sent electronically via the internet to the following email address: Notice.comments@irscounsel.treas.gov. Include the notice number (Notice 2011-66) in the subject line.

EFFECTIVE DATE

This notice is applicable to executors of the estates of decedents who died in 2010, and to persons acquiring property from such a decedent whose executor makes the Section 1022 Election. This notice is also applicable to donors who made a GST transfer or an indirect gift for purposes of the GST tax during 2010. The Treasury Department and the IRS intend to issue regulations to confirm the guidance set forth in this notice.

DRAFTING INFORMATION

The principal authors of this notice are Laura Urich Daly, Theresa Melchiorre, and Mayer Samuels of the Office of Associate Chief Counsel (Passthroughs & Special Industries). For further information regarding this notice, contact Laura Urich Daly, Theresa Melchiorre, or Mayer Samuels on (202) 622-3090 (not a toll-free call).

PAPERWORK REDUCTION ACT

The collection of information contained in this notice has been submitted to the Office of Management and Budget (OMB) in accordance with the Paperwork Reduction Act (44 U.S.C. 3507) and OMB approval is pending. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number.

The first, second, and third collection of information requirements, as required by section 6018(c) and (e), are in section I.C. of this notice. The collection of information relates to the requirement that the executor provide a statement to each recipient acquiring property reported on Form 8939. Section I.C of this notice also requires the executor to provide updated statements to each recipient of property affected by any adjustment made to Form 8939. Finally, section I.C of this notice requires the executor to provide any other information and supporting documentation as identified in the instructions to the Form 8939 or in any Internal Revenue Bulletin (see § 601.601(d)(2)(ii)(b)). This collection of information is necessary for the proper performance of the function of the IRS in the collection of income tax when the property is later disposed of by the recipient or other holder of the property.

It is anticipated that the decedent's executor will complete and attach to Form 8939 schedules showing property received by each recipient acquiring property from a decedent. To meet this collection of information requirement, the executor is required to send a copy of the schedule relating to property received by that particular recipient to such recipient and to send an updated schedule to each recipient in the event the information on the schedule changes. The decedent's executor will also have to provide any other information and supporting documentation as identified in the instructions to the Form 8939 or in any Internal Revenue Bulletin. We estimate that approximately 7,000 estates of decedents who died in 2010 will file Form 8939 and that it will take an executor approximately 10 hours to comply with these requirements. The total reporting burden is estimated to be 70,000 hours.

The fourth collection of information requirement in this notice is in section II.A, as provided in Treasury Regulation § 26.2632-1(d)(1), and relates to allocating the decedent's unused GST exemption. This information collection is necessary for the proper performance of the function of the IRS in the collection of GST tax when there is a taxable termination or taxable distribution. We estimate that 6,000 executors of estates of decedents who died in 2010 will allocate the decedent's unused GST exemption on a Schedule R for Form 8939 attached to Form 8939 and that it will take each executor approximately 3 hours to prepare the documentation. The total reporting burden is estimated to be 18,000 hours.

Books or records relating to collections of information must be retained as long as their contents may become material in the administration of any internal revenue law.

Generally, tax returns and tax return information are confidential, as required by section 6103.