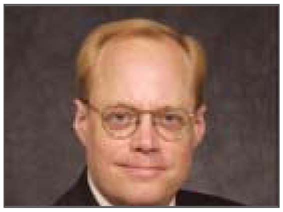

Robert W. Wood
THE TAX LAWYER

Aug. 19 2011 — 9:19 am

Beware New Estate Tax Election

Image via Squidoo

It's old news to talk of the great estate tax timing everyone ***assumes*** people got if they died in 2010, the one year in recent memory there was no federal estate tax. More than a few billionaires made a final demonstration of their incredible timing by dying when there was no estate tax. Their heirs got a windfall thanks to Congress' inaction even though the estate tax was scheduled to sunset since 2001.

Under the 2010 Tax Relief Act the estate tax has a $5M per person exemption and a 35% top rate for those dying in 2011 and 2012. What about the billionaires who escaped the tax entirely by dying in 2010? Actually, these people must elect out of the estate tax. Why?

When the deal was enacted in late 2010 for an estate tax with a $5M exemption for 2011 and 2012, the estate tax was reinstated for 2010 deaths too, unless you elect out. That put a premium on technical compliance. The estates and heirs of billionaires may be well-advised, but others might miss this. Don't.

Executors of the estates of decedents who died in 2010 may opt out of the federal estate tax and elect to be governed by the repealed carry-over basis provisions of the 2001 Act. To do this, those executors must file a federal [Form 8939](), Allocation of Increase in Basis for Property Acquired from a Decedent.

Opting out of the estate tax regime means opting out of stepped-up basis (for income tax purposes) under [IRC Section 1014]() and opting into the modified carryover basis rule under [IRC Section 1022](). One of the main plusses about estate tax is that it is paired with a stepped-up income tax basis. You should not be paying both estate tax and income tax on the same assets.

Carryover basis generally means that assets keep the same basis—the basis in the hands of the decedent "carries over" to the recipient. An exception: if the basis is greater than fair market value (because its value has declined), the basis in the hands of the recipient is limited to fair market value.

If you are an executor contemplating making this election, you should start collecting the decedents' records. You'll need to know when the decendent acquired the properties owned at death and their basis. Records or appraisals showing values at death should also be obtained. Carryover basis will require a lot of work, but the tax savings can be worth the effort. Get some independent advice if you're not sure what to do.

The IRS has released some guidance but still hasn't yet released the tax form. [Here]() is a draft copy of the form. The new guidance will assist executors who are opting out of the estate tax so the carryover basis rules will apply. See [IR-2011-83]().

Form 8939, the basis allocation form filed by executors making this election, is due Nov. 15, 2011. The IRS expects to issue Form 8939 and the related instructions early this fall. As you wait for the [Form 8939](), here are a few pointers:

- Shortly after the IRS releases the final [Form 8939](), you'll see the Instructions too, followed by IRS Publication 4895, Tax Treatment of Property Acquired From a Decedent Dying in 2010.

- Form 8939 should not be filed with the decedent's final income tax return.
- Instructions how to make the election will be described on the final Form 8939, the Instructions and Publication 4895.

For more, see:

Tax Deadlines For 2010 Deaths? IRS Finally Issues Guidance

IRS Releases Guidance (But No Form) for 2010 Estates

Wealthy Take Estate—Tax Exemptions Beyond Grave Until 2013

Notice 2011-66

It Pays To Plan For Future Estate Tax Changes

Will Ohio Estate Tax Repeal Trigger More?

What's Next For Estate Tax Impacts You Now

How Much Should You Give Away In 2011-2012?

Election For 2010 Estates: Big Headache

Revenue Procedure 2011-41

IRS Offers Guidance on Estate Tax Carryover Basis for People Who Died in 2010

Estate Executors Must Decide 2010 Tax by Nov. 15, IRS Says

Robert W. Wood practices law with Wood LLP, in San Francisco. The author of more than 30 books, including Taxation of Damage Awards & Settlement Payments (4th Ed. 2009, Tax Institute), he can be reached at Wood@WoodLLP.com. This discussion is not intended as legal advice, and cannot be relied upon for any purpose without the services of a qualified professional.