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THE TAX LAWYER

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### Election For 2010 Estates: Big Headache

If someone you know died in 2010, the great estate tax timing everyone **assumes** they got may turn out not to be so great after all. If they were a billionaire, the beneficiaries may be very happy, escaping all that estate tax even if they do get some assets with a low basis that triggers income tax when sold. But elsewhere it can be mixed.

The [2010 Tax Relief Act](#) restored the estate tax for individuals dying in 2010 with a \$5 million per person exemption and a maximum rate of 35%. It also repealed the modified carryover basis rules for property acquired from a decedent who died in 2010. However, estates of individuals dying in 2010 can **elect** zero estate tax and the modified carryover basis rules that would have applied before they were repealed. That means the basis of assets acquired from the decedent would be the lesser of the decedent's adjusted basis (carryover basis) or the fair market value of the property on the date of the decedent's death.

If the estate elects to apply the carryover basis rules, property with a built-in gain can generally have its basis increased as follows:

- The executor can allocate up to \$1.3 million, increased by unused losses and loss carryovers (\$60,000 in the case of a decedent nonresident not a citizen of the United States, but with no loss or loss carryover increase) to increase the basis of these assets; and

- The executor can also allocate an additional amount, up to \$3 million, to increase the basis of assets passing to a surviving spouse, either outright or in a Qualified Terminable Interest Property (“QTIP”) trust.

The allocations of the general basis increase and the spousal property basis increase must be made by the executor. The IRS website notes that the 2010 [Form 8939](#), Allocation of Increase in Basis for Property Acquired From a Decedent, is not yet final.

- Shortly after the final Form 8939 is available, Instructions for Form 8939 will be also be available, followed by Publication 4895, Tax Treatment of Property Acquired From a Decedent Dying 2010.
- Form 8939 should **not** be filed with the decedent’s final income tax return.
- The election to have the modified carryover basis rules should **not** be made on the decedent’s final income tax return.
- The final Form 8939 will be posted at least 90 days before it is required to be filed. Detailed information about filing Form 8939 (including when, where, how, by whom, and for what purposes to file) will be included in the Instructions for Form 8939 and in Publication 4895.
- Instructions as to how to make the election will be described on the final Form 8939, as well as in the Instructions for Form 8939 and in Publication 4895.

If your head hurts already, you’re not alone. If you are an executor contemplating making this election, you should start collecting the decedents’ records. You’ll need to know when he acquired the properties he owned at death and his basis in them. Records or appraisals showing values at death should also be obtained. Carryover basis will require a lot of work, but the estate tax savings can be well worth the effort.

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