

Part III - Administrative, Procedural, and Miscellaneous

Due Dates for Filing Form 706, Form 706-NA, or Form 8939, Extension of Time to Pay Estate Tax, and Penalty Relief for Recipients of Property Acquired from Decedents who Died in 2010

Notice 2011-76

PURPOSE

This notice provides the executor of an estate of a decedent who died in 2010 (Executor of a 2010 Estate) who timely files a Form 4768, Application for Extension of Time to File a Return and/or Pay U.S. Estate (and Generation-Skipping Transfer) Taxes, an automatic extension of time to file an estate tax return and to pay the estate tax due. Furthermore, this notice revises the due date of Form 8939, Allocation of Increase in Basis for Property Acquired From a Decedent. It also provides penalty relief to certain persons who acquired property, the basis of which is determined under section 1022, and disposed of such property during 2010. This notice applies to each Executor of a 2010 Estate and to recipients of property acquired from decedents who died in 2010.

BACKGROUND

In General

Section 501 of the Economic Growth and Tax Relief Reconciliation Act of 2001, P.L. 107-16 (115 Stat. 69) (EGTRRA), repealed the estate tax for the estates of decedents who died in 2010 (2010 Decedents). EGTRRA also repealed section 1014 and replaced it with section 1022. Section 1014 generally provides that the recipient's basis in property passing from a decedent is the fair market value (FMV) of the property on the decedent's date of death. Section 1022 generally provides that the recipient's basis in property acquired from a decedent is the lesser of the decedent's adjusted basis in the property and the FMV of the property on the decedent's date of death.

Section 301(a) of the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, P.L. 111-312 (124 Stat. 3296) (TRUIRJCA), repealed section 501 of EGTRRA and section 1022. The repeal of EGTRRA retroactively reinstated the estate tax for 2010 Decedents and also reinstated section 1014. TRUIRJCA also increased the applicable exclusion amount to \$5,000,000 for 2010 Decedents. Section 301(c) of TRUIRJCA, however, allows the Executor of a 2010 Estate to elect not to have the estate tax provisions and section 1014 apply, but rather, to have the provisions of section 1022 apply (Section 1022 Election). With the election, the estate will pay no estate tax and in most cases the basis of the property acquired from the decedent will be determined under section 1022. In addition, the executor may allocate additional basis to certain property. See Rev. Proc. 2011-41, 2011-35 I.R.B. 188.

Filing and Payment Dates

Under section 301(d) of TRUIRJCA, the due date for filing an estate tax return and for paying the estate tax for an estate of a decedent who died after December 31, 2009, and before December 17, 2010, is no earlier than September 17, 2011. The due date, therefore, for estates of decedents who died on or after January 1, 2010, and on or before December 16, 2010, is September 19, 2011, because September 17, 2011, falls on a Saturday. Under section 6075(a), the due date for filing an estate tax return for a decedent who died after December 16, 2010, is nine months after the date of the decedent's death. Section 6151 provides that, when a tax return is required, the person required to make such return shall pay such tax at the time and place fixed for filing the return (determined without regard to any extension of time for filing the return).

Section 542 of EGTRRA provides that the return required under former section 6018 (Form 8939, which is filed to make a Section 1022 Election, to report the information required under section 6018, and to allocate additional basis under section 1022) shall be filed with the decedent's final income tax return (for example: Form 1040, United States Individual Income Tax Return, or Form 1040-NR, United States Nonresident Alien Income Tax Return) or by such later date specified in regulations prescribed by the Secretary. Notice 2011-66, 2011-35 I.R.B. 184, which the Treasury Department and IRS intend to confirm in regulations, provides that Form 8939 is due on or before November 15, 2011.

Section 6081 provides that the Secretary may grant a reasonable extension of

time for filing any return and that, except in the case of taxpayers who are abroad, no such extension may be for more than six months. In addition, section 6161(a) provides that the Secretary may extend the time for payment of the amount of the tax shown, or required to be shown, on any return for a reasonable period from the date fixed for payment thereof.

GUIDANCE

Forms 706 and 706-NA

Because of the date Congress enacted TRUIRJCA and the length of time required to implement the legislative changes and to issue the Form 8939 with related instructions, the Executor of a 2010 Estate may not have sufficient time to make an informed decision as to whether or not to make a Section 1022 Election and to complete the required filings. Therefore, the Treasury Department and IRS believe it is reasonable to grant the estates of 2010 Decedents an automatic extension of time to file the estate tax return and an extension of time to pay the estate tax. Accordingly, the Treasury Department and IRS grant the Executor of a 2010 Estate who files a Form 4768 by the due date for filing Form 706, United States Estate (and Generation-Skipping Transfer) Tax Return, or Form 706-NA, United States Estate (and Generation-Skipping Transfer) Tax Return Estate of Nonresident not a Citizen of the United States, both an automatic six-month extension of time to file Form 706 or Form 706-NA pursuant to section 6081, and a six-month extension of time to pay the estate tax. The Executor of a 2010 Estate is not required to substantiate on the Form 4768 the reason for requesting an extension of time for payment of the estate tax to receive the

six-month extension of time to pay the estate tax due. However, interest will accrue on the estate tax liability from the due date of the return, excluding extensions. See I.R.C. § 6601.

Except in the case of an executor abroad, under section 6081, the Treasury Department and IRS cannot grant additional extensions of time to file Form 706 or Form 706-NA to such estates, regardless of whether an executor files a Form 4768 requesting an additional extension of time to file. An executor, however, may apply for an additional extension of time to pay the estate tax under section 6161 if the executor files a Form 4768 on or before the extended due date of the payment of tax and provides the documentation required with such form. See I.R.C. § 6161.

The IRS will not impose late filing and late payment penalties under section 6651(a)(1) or (2) on estates of decedents who died after December 31, 2009, and before December 17, 2010, if the estate timely files Form 4768 and then files Form 706 or Form 706-NA and pays the estate tax by March 19, 2012. The IRS also will not impose late filing or late payment penalties under section 6651(a)(1) or (2) on estates of decedents who died after December 16, 2010, and before January 1, 2011, if the estate timely files Form 4768 and then files Form 706 or Form 706-NA and pays the estate tax within 15 months after the decedent's date of death.

Form 8939

The due date for filing Form 8939 is changed from November 15, 2011, to January 17, 2012. Thus, a Section 1022 Election is timely if made on a Form 8939 filed by (and may be amended or revoked on or before) January 17, 2012. The Treasury

Department and IRS will not grant any further extension of time to file Form 8939, to make the Section 1022 Election, or to amend or revoke the Section 1022 Election, except as provided in sections I.A, B, or D.1 or 2 of Notice 2011-66. Accordingly, as contemplated in section I.D.2 of Notice 2011-66, an executor may file an amended Form 8939 if the provisions of § 301.9100-2(b) are satisfied, by July 17, 2012.

Moreover, the penalty under section 6716 does not apply to the Executor of a 2010 Estate solely because the Form 8939 is filed after November 15, 2011, but on or before January 17, 2012. Similarly, a penalty under section 6716 does not apply to the Executor of a 2010 Estate solely because a statement required to be furnished to beneficiaries is provided after December 15, 2011, but on or before February 17, 2012.

Generation-Skipping Transfer (GST) Tax

If an executor makes a Section 1022 Election on a Form 8939 filed on or before January 17, 2012, and allocates the decedent's available GST exemption (or makes an election under the GST tax) on an attached Schedule R or R-1, the allocation or election will be considered timely and effective as of the decedent's date of death pursuant to section 2632. Alternatively, the automatic allocation rules under section 2632 will apply if the executor timely files the Form 8939 without attaching a Schedule R or R-1. If the executor does not make the Section 1022 Election or if the executor timely revokes a Section 1022 Election, then the automatic allocation rules under section 2632 will apply unless the executor timely files Form 706 or Form 706-NA with the Schedule R or R-1 attached.

Federal Income Tax Return for any Individual, Estate, or Trust, Form 709, and State

Estate or Inheritance Tax

This notice does not extend the due date for paying any income tax or for filing any income tax return for any individual, estate, or trust (for example, Form 1040, Form 1040-NR, or Form 1041, United States Income Tax Return for Estates & Trusts). In addition, this notice does not extend the due date for paying any gift tax or for filing any Form 709, United States Gift (and Generation-Skipping Transfer) Tax Return. Finally, this notice does not extend the time to file an estate or inheritance tax return required by any state of the United States or to pay any estate or inheritance tax due to such state.

Penalty Relief

Section 6651(a)(2) generally provides that, in the case of any failure to pay the tax shown on any return required to be filed under subchapter A of chapter 61 on its due date, unless it is shown that the failure is due to reasonable cause and not willful neglect, an addition to tax shall apply. In addition, section 6662(a) imposes a 20 percent penalty on any portion of an underpayment of tax due to negligence, disregard of rules or regulations, or a substantial understatement of income tax. Section 6664(c) provides that no penalty under section 6662(a) shall be imposed on any portion of an underpayment if it is shown that there is a reasonable cause for such portion and that the taxpayer acted in good faith with respect to such portion.

Revenue Procedure 2011-41 provides a safe harbor for determining a recipient's basis and other pertinent information such as the tax character and holding period of property acquired from a 2010 Decedent and whose executor makes a Section 1022 Election. However, when the recipient of property acquired from a decedent who

disposed of such property during 2010 files the recipient's income tax return, the recipient may not know whether the decedent's executor will make the Section 1022 Election and, if so, the amount (if any) of Basis Increase (as defined in Rev. Proc. 2011-41) the executor will allocate to that property. Therefore, the recipient may not know the property's basis or other pertinent information such as tax character and holding period. When filing the recipient's income tax return and computing the income tax liability, the recipient will have to make a good faith estimate, based on the facts and circumstances, regarding such information with respect to the property acquired from the 2010 Decedent. Accordingly, to the extent that the recipient's tax liability is increased, as shown on an amended return or otherwise, by reason of the application of section 1022 to the estate of a 2010 Decedent, the recipient's reasonable cause and good faith will be presumed and the Treasury Department and IRS will not impose either the section 6651(a)(2) addition to tax for failure to pay, or the section 6662(a) penalty. The recipient should write across the top of the amended return "IR Notice 2011-76" to alert the IRS that the recipient meets these requirements for reasonable cause.

EFFECTIVE DATE

This notice is effective on September 13, 2011. This notice applies to each Executor of a 2010 Estate and to persons acquiring property from a 2010 Decedent.

DRAFTING INFORMATION

The principal authors of this notice are Laura Daly, Theresa Melchiorre, and Mayer Samuels of the Office of Associate Chief Counsel (Passthroughs & Special

Industries). For further information regarding this notice contact Laura Daly, Theresa Melchiorre, or Mayer Samuels on (202) 622-3090 (not a toll-free call).