

Supplemental Information on New York State Estate Tax Filing Requirements Related to the Federal 2010 Tax Relief Act

This TSB-M supplements the information provided in TSB-M-11(1)M and includes information regarding:

- filing procedures for 2010 dates of death
- effect of elections made on a federal estate tax return
- valuation of the gross estate

New York State filing procedures for 2010 dates of death

As explained in TSB-M-11(1)M, *Filing Requirements for New York Estate and Generation-Skipping Transfer Taxes Not Affected by the Federal 2010 Tax Relief Act*, the due date for filing the federal estate tax return for estates of individuals dying after December 31, 2009, and before December 17, 2010, was extended to September 19, 2011. This extended due date does not apply for New York purposes. For estates of individuals dying after December 31, 2009, and before January 1, 2011, Form ET-706, *New York State Estate Tax Return*, must be filed within nine months after the date of death. If necessary, an estate may apply for a six-month extension by filing Form ET-133, *Application for Extension of Time to File and/or Pay Estate Tax*. (For more information, see TSB-M-11(1)M.)

The federal 2010 Tax Relief Act gives estates the option not to file for federal estate tax purposes for individuals with dates of death in 2010. If a New York State estate is below the federal filing threshold or elects not to file for federal purposes for an individual dying in 2010, the estate must file a pro forma federal return with Form ET-706. If a New York State estate elects to file for federal purposes for an individual dying in 2010, the estate must submit a copy of the actual federal estate tax return with Form ET-706.

To avoid interest and penalties, the estate must file Form ET-706 by the due date or extended due date and pay the correct tax due. If the New York State estate tax return is filed late, but not later than the federal due date (or extended due date), the return should be marked *Late – federal 2010 tax relief act*. Subject to verification by the Tax Department, penalties will be abated. However, interest will apply to any unpaid balance required to be reported on Form ET-706 after 9 months from the date of death.

If the tax initially reported on Form ET-706 changes after the return is filed, the estate must file an amended Form ET-706 to report and pay any additional tax or to claim a refund within three years from the date the New York State estate tax return was filed. If the tax was underpaid, interest and penalties will apply to any balance due. However, estates may submit a statement of reasonable cause requesting abatement of penalties.

Federal elections and other items are binding when a federal estate tax return is filed

Unless New York State laws provide otherwise¹, when an estate tax return is filed for federal purposes, the amounts used to compute the gross estate and any elections reported on the federal return are binding for New York State estate tax purposes. This applies generally when an estate tax return is filed or required to be filed for federal purposes, and it includes certain elections applicable to estates of individuals dying in 2010, 2011, or 2012. For example, this includes a federal estate tax return filed by an estate solely to:

- establish a stepped-up basis of the estate assets as of the date of death;
- make a portability election for 2011 or 2012 to allow the surviving spouse to claim the unused portion of the applicable exclusion amount of his or her predeceased spouse (see details below); or
- make an election to avoid the deemed allocation rules for certain generation-skipping transfers.

Example:

The estate of an individual dying in 2011 is below the federal filing threshold, but the executor elects to file a federal estate tax return solely in order to make a portability election to allow the surviving spouse to claim the unused portion of the applicable exclusion amount of his (or her) predeceased spouse. The estate does not make an alternate valuation election or qualified terminable interest property (Q-TIP) election on the federal return. Since the elections were not made on the federal return that was filed with the Internal Revenue Service, a separate alternate valuation election or Q-TIP election cannot be made for New York State estate tax purposes.

Elections and other items may be reported independently on a pro forma federal return when a federal estate tax return is *not* filed

If a New York State estate is below the federal filing threshold or elects not to file a federal estate tax return for a 2010 date of death, the amounts used to compute the gross estate and any applicable elections may be reported independently on the pro forma estate tax return attached to the New York State estate tax return.

Example:

The estate of an individual dying in 2010 is above the federal filing threshold, but the executor elects not to file a federal estate tax return. The executor files a separate form to indicate the modified carryover basis for federal income tax purposes of property acquired by the surviving spouse and other beneficiaries of the estate. Since an actual

¹ See *Implementation of the Marriage Equality Act Related to the New York State Estate Tax*, TSB-M-11(8)M.

federal estate tax return has not been filed, the estate must compute the New York gross estate based on a pro forma federal estate tax return. If applicable, the estate may make an alternate valuation election or Q-TIP election on its pro forma federal estate tax return.

Valuation of gross estate

The New York State estate tax is generally conformed to the federal Internal Revenue Code of 1986, including all amendments enacted on or before July 22, 1998. As a result, the amendments made by the 2010 Tax Relief Act, including the valuation of assets, do not apply for purposes of the New York State estate tax. For New York State estate tax purposes, the estate must value all property included in the gross estate on the date of the decedent's death, unless the estate elects alternate valuation.

Under the federal 2010 Tax Relief Act, when the estate of an individual dying in 2010 elects not to file a federal estate tax return, the modified carryover basis rules under the federal Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA) apply to the assets transferred to the beneficiaries of the estate property. Although the date of death value must be used for purposes of the New York State estate tax, the New York State personal income tax is based on the information reported on the federal income tax return, including income and federal adjustments to income. As a result, when the assets transferred upon the individual's death are subsequently sold, the same modified carryover basis used to report any capital gain/loss for federal income tax purposes must be used for New York State personal income tax purposes.

Portability

The federal 2010 Tax Relief Act allows portability of the federal estate tax applicable exclusion between spouses for 2011 and 2012. As a result, for federal estate tax purposes, a surviving spouse is allowed the basic exclusion amount of \$5 million as well as the unused portion of the deceased spouse's applicable exclusion. In order to take advantage of the unused spousal exclusion amount, the surviving spouse will be required to make an affirmative election in a manner to be determined by the IRS (i.e., a timely filed federal estate tax return or other document).

The portability election for federal estate tax purposes is not allowed for New York State estate tax purposes. The unified credit for New York State is fixed at the amount allowable as if the federal applicable exclusion were \$1 million.

Disclaimers

For an individual dying after December 31, 2009, and before December 17, 2010, the federal 2010 Tax Relief Act also extended the due date for making a disclaimer of an interest in property passing by reason of the death to September 17, 2011. However, to constitute a qualified disclaimer for New York purposes, the disclaimer (renunciation) must be made within 9 months of the date of death, unless the court having jurisdiction over the will or trust extends the time to file. See Estates, Powers, and Trusts Law, Article 2, Part 1.

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