

**Office of Chief Counsel
Internal Revenue Service
memorandum**

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to:

(Small Business/Self-Employed)

from: J. Peter Baumgarten, Assistant to the Branch chief, Branch 4
(Income Tax & Accounting)

subject: Repeal of 121(d)(11)

This memorandum addresses whether § 121(d)(11) of the Internal Revenue Code, regarding the exclusion of gain on the sale of principal residence property acquired from a decedent, is still in effect. This advice may not be used or cited as precedent.

ISSUES

Is § 121(d)(11), regarding the exclusion of gain on the sale of principal residence property acquired from a decedent, still in effect?

CONCLUSION

For most taxpayers, § 121(d)(11) is obsolete. The only exception is in the case of a taxpayer receiving a house from a decedent who died in 2010 for whom the executor of the decedent's estate makes an election to not have the provisions of chapter 11 (the estate tax) apply to the decedent's estate. Taxpayers receiving a principal residence from a decedent under this election may still apply § 121(d)(11).

LAW AND ANALYSIS

Section 121(d)(11) generally provides that for property acquired from a decedent, or the decedent's estate or trust, the taxpayer may take into account the ownership and use by

the decedent for determining eligibility to exclude gain on the sale or exchange of the property.

Section 542(c), Subtitle E, Title V of the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA), P.L. 107-16 originally enacted § 121(d)(11) as § 121(d)(9).¹ This provision was effective for estates of decedents dying after December 31, 2009. In addition, Title IX of EGTRRA, at section 901, provides that Title V of EGTRRA (including § 121(d)(11)) does not apply in taxable years beginning after December 31, 2010.

On December 17, 2010, section 301(a) of the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, P.L. 111-312, (the 2010 Act), retroactively repealed § 121(d)(11), as if it “had never been enacted.” However, section 301(c) of the 2010 Act allows the executor of an estate of a decedent who died in 2010 to elect to apply § 121(d)(11) as though section 301(a) of the 2010 Act did not apply with respect to chapter 11 of the Internal Revenue Code (the estate tax), and with respect to property acquired or passing from the decedent (within the meaning of § 1014(b)). Section 101(a)(1) of the American Taxpayer Relief Act of 2012, P.L. 112-240 (January 2, 2013) (the 2013 Act) provides that EGTRRA is amended by striking Title IX.

Thus, under the 2010 Act, §121(d)(11) was struck as if never enacted, unless the executor made a proper election, as provided in section 301(c) of the 2010 Act. If the executor makes the election under section 301(c) with respect to a decedent dying in 2010, then § 121(d)(11) may apply to take into account the ownership and use of the property by the decedent. On the other hand, if the executor makes no election, or the decedent died before or after 2010, a selling taxpayer may not take into account the ownership or use of the property by the decedent. Section 101(a)(1) of the 2013 Act does not affect this conclusion because it does not by its terms, either explicitly or implicitly, repeal section 301 of the 2010 Act, or reenact Subtitle E of title V of EGTRRA.

Accordingly, § 121(d)(11) is not wholly repealed. Taxpayers receiving a principal residence from a decedent or a decedent’s estate may apply § 121(d)(11) to take into account the ownership and use by the decedent for determining eligibility to exclude gain on the sale of such property, if the executor of a decedent who died in 2010 makes a proper election under section 301(c) of the 2010 Act.²

Please call Shareen S. Pflanz (202) 317-4718 if you have any further questions.

¹ Section 121(d)(9) was later redesignated as § 121(d)(10) by the Military Family Tax Relief Act of 2003, P.L. 108-121, § 101(a), and then redesignated as § 121(d)(11) by the Gulf Opportunity Zone Act of 2005, P.L. 109-135, § 403(ee)(1)-(2).

² Pursuant to Notice 2011-66, 2011-35 I.R.B. 184, the executor of an estate of a decedent who died in 2010 makes this election by timely filing a Form 8939.

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