

**Internal Revenue Service**

Department of the Treasury  
Washington, DC 20224

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Person To Contact:  
, ID No.

Telephone Number:

Refer Reply To:  
CC:PSI:B04  
PLR-110327-14

Date:  
July 15, 2014

In Re:

Legend:

- Decedent =
- Executor =
- Law Firm =
- Accounting Firm =
- Date 1 =
- Date 2 =
- Date 3 =
- Date 4 =

Dear :

This responds to your personal representative’s letter of March 5, 2014, and subsequent correspondence, requesting an extension of time pursuant to § 301.9100-3 of the Procedure and Administration Regulations to file a Form 8939 (Allocation of Increase in Basis for Property Acquired from a Decedent) to make an election under § 1022 of the Internal Revenue Code (Code) (Section 1022 Election), and to allocate basis to eligible property transferred as a result of Decedent’s death.

The facts and representations submitted are as follows. Decedent died testate in 2010. Executor retained Law Firm to assist in the administration of the estate and Accounting Firm to prepare the Form 8939. It is represented that on Date 1, a date before January 17, 2012, Executor signed the Form 8939 in Accounting Firm’s office. Accounting Firm made copies of the signed Form 8939 for its file and for Executor. Accounting Firm then mailed the original Form 8939 to the IRS Service Center.

It is represented that Accounting Firm has a long-standing practice, with specific procedures in place, to mail by regular mail with the United States Postal Service tax returns that show little or no tax due. Accounting Firm did not advise Executor that there were other methods of mailing the Form 8939 which would have ensured timely filing.

In correspondence dated Date 2, the IRS notified Executor that the IRS had no record of having received a Form 706, United States Estate (and Generation-Skipping Transfer) Tax Return. The Date 2 letter to Executor stated that if Executor determined that a Form 706 was not needed, then to provide a detailed explanation to that effect. It is represented that on or about Date 3, the IRS learned from Law Firm that Executor did not file the Form 706 because Executor elected not to have the estate be subject to federal estate tax. Law Firm then informed the IRS that it thought that Accounting Firm had filed the Form 8939. Also on Date 3, the IRS asked Law Firm for a copy of the Form 8939, and Law Firm responded that it would provide a copy.

In the interim, the IRS examiner contacted the IRS Service Center to obtain a copy of Decedent's Form 8939. The IRS Service Center responded that it never received a Form 8939 from the estate. On or about Date 4, several months after Date 3, and after several communications between the IRS examiner, Executor, and Law Firm, Executor provided the IRS with a copy of the Form 8939 that Accounting Firm claimed to have mailed on Date 1 following its long-standing practice. Because the IRS had no record of ever having received Decedent's original Form 8939, the IRS asked Executor for proof of timely mailing. In response, Accounting Firm provided the IRS with affidavits recounting the above facts with respect to the mailing, via regular mail, of the Form 8939. Executor has not provided proof that the Form 8939 was mailed via United States registered or certified mail, or other designated delivery service, and maintains that the United States Postal Service lost the filing.

Executor is requesting an extension of time pursuant to § 301.9100-3 to file the Form 8939 to make the Section 1022 Election and to allocate basis provided by § 1022 to eligible property transferred as a result of Decedent's death.

#### Law and Analysis:

Section 7502(a) of the Code provides, in part, that if any return required to be filed within a prescribed period or on or before a prescribed date under authority of any provision of the internal revenue laws is, after such period or such date, delivered by United States mail to the agency with which such return is required to be filed, the date of the United States postmark stamped on the cover in which such return is mailed shall be deemed to be the date of delivery.

Section 7502(c)(1) provides that for purposes of § 7502, if any return is sent by United States registered mail, such registration shall be prima facie evidence that the return was delivered to the agency to which addressed and the date of registration shall be deemed to be the postmark date. Section 7502(c)(2) further provides that the Secretary is authorized to provide by regulations the extent to which the provisions of paragraph (1) with respect to prima facie evidence of delivery and the postmark date shall apply to certified mail.

Section 7502(f) provides that any reference to the United States mail shall be treated as including a reference to any designated delivery service. The term “designated delivery service” means any delivery service provided by a trade or business if such service is designated as such by the Secretary for purposes of § 7502.

Under § 301.7502-1(c)(2), if a document is sent by U.S. registered mail, the date of registration of the document is treated as the postmark date. If a document is sent by U.S. certified mail and the sender’s receipt is postmarked by the postal employee to whom the document is presented, the date of the U.S. postmark on the receipt is treated as the postmark date of the document.

Section 301.7502-1(e)(1) provides that § 7502 is not applicable unless the document is delivered by the United States mail to the agency with which the document is required to be made. However, in the case of a document sent by United States registered or certified mail, proof that the document was properly registered or that a postmarked certified mail sender’s receipt was properly issued and that the envelope was properly addressed to the agency constitutes prima facie evidence that the document was delivered to the agency. Section 7502(c); Treas. Reg. § 301.7502-1(e)(2). Other than direct proof of actual delivery, proof of proper use of registered or certified mail are the exclusive means to establish prima facie evidence of delivery. No other evidence will be prima facie evidence of delivery or raise a presumption that the document was delivered. Treas. Reg. § 301.7502-1(e)(2).

Section 1022(a) provides that property acquired from a decedent who died after December 31, 2009, is treated as transferred by gift, and the basis of the person acquiring the property from such a decedent is the lesser of the adjusted basis of the decedent or the fair market value of the property at the date of the decedent’s death.

Section 1022(b)(1) provides, in general, that the basis of property under § 1022(a) is increased by its basis increase that is allocated to the property.

Section 1022(b)(2)(A) provides, in general, that basis increase is the portion of the aggregate basis increase that is allocated to the property.

Section 1022(b)(2)(B) and (C) provide that the aggregate basis increase is \$1,300,000, and that the aggregate basis increase is increased by--(i) the sum of the amount of any capital loss carryover under § 1212(b), and the amount of any net operating loss carryover under § 172 that would (but for the decedent’s death) be carried from the decedent’s last taxable year to a later taxable year of the decedent, plus (ii) the sum of the amount of any losses that would have been allowable under § 165 if the property acquired from the decedent had been sold at fair market value immediately before the decedent’s death.

Section 1022(c)(1) provides that in the case of property that is qualified spousal property, the basis of such property under § 1022(a) (as increased under § 1022(b)) is increased by its spousal property basis increase allocated to the property.

Section 1022(c)(2)(A) provides, in general, that spousal property basis increase is the portion of the aggregate spousal property basis increase which is allocated to the property. Section 1022(c)(2)(B) provides that the aggregate spousal property basis increase is \$3,000,000.

Section 1022(d)(1)(A) provides, in general, that the basis of property acquired from a decedent may be increased under § 1022(b) or (c) only if the property was owned by the decedent at the time of death. Section 1022(d)(1)(B) describes property that is considered to be owned by the decedent at the time of death.

Section 1022(d)(2) provides that the basis adjustments under § 1022(b) and (c) shall not increase the basis of any interest in property above its fair market value in the hands of the decedent as of the date of the decedent's death.

Section 1022(d)(3) provides, in general, that the executor is to allocate the basis adjustments under § 1022(b) and (c) on the return required by § 6018 and that any allocation made may be changed only as provided by the Secretary.

Section 1022(e) describes property that is considered to be acquired from the decedent for purposes of § 1022.

Subtitle A of title V of the Economic Growth and Tax Relief Reconciliation Act of 2001, P.L. 107-16 (115 Stat. 76-81), enacted section 2210, which made chapter 11 (the estate tax) inapplicable to the estate of any decedent who died in 2010 and chapter 13 (the GST tax) inapplicable to generation-skipping transfers made in 2010. On December 17, 2010, the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 (TRUIRJCA), P.L. 111-312 (124 Stat. 3296), became law, and § 301(a) of TRUIRJCA retroactively reinstated the estate and GST taxes. However, § 301(c) of TRUIRJCA allows the executor of the estate of a decedent who died in 2010 to elect to apply the Code as though § 301(a) of TRUIRJCA did not apply with respect to chapter 11 and for property acquired or passing from a decedent (within the meaning of § 1014(b)). Thus, § 301(c) of TRUIRJCA allows the executor of the estate of a decedent who died in 2010 to elect not to have the provisions of chapter 11 apply to the decedent's estate, but rather, to have the provisions of § 1022 apply.

Notice 2011-66, 2011-35 I.R.B. 184, section I.A. provides that the executor of the estate of a decedent who died in 2010 makes the Section 1022 Election by filing a Form 8939 on or before November 15, 2011. Notice 2011-76, 2011-40 I.R.B. 479, extended the due date of the Form 8939, and thus the election, from November 15, 2011 to January 17, 2012.

Notice 2011-66, section I.D.1, provides that the Internal Revenue Service will not grant extensions of time to file a Form 8939 and will not accept a Form 8939 filed after the due date except in four limited circumstances provided in section I.D.2. Under this section of Notice 2011-66, an executor may apply for relief under § 301.9100-3.

Section 301.9100-1(c) provides that the Commissioner has discretion to grant a reasonable extension of time under the rules set forth in §§ 301.9100-2 and 301.9100-3 to make a regulatory election, or a statutory election (but no more than 6 months except in the case of a taxpayer who is abroad), under all subtitles of the Code except subtitles E, G, H, and I.

Section 301.9100-3 provides the standards used to determine whether to grant an extension of time to make an election whose due date is prescribed by a regulation (and not expressly provided by statute). Under § 301.9100-1(b), a regulatory election includes an election whose due date is prescribed by a notice published in the Internal Revenue Bulletin.

Requests for relief under § 301.9100-3 will be granted when the taxpayer provides the evidence to establish to the satisfaction of the Commissioner that the taxpayer acted reasonably and in good faith, and that granting relief will not prejudice the interests of the Government.

Section 301.9100-3(b)(1) provides, in relevant part, that a taxpayer is deemed to have acted reasonably and in good faith if (a) the taxpayer failed to make the election because of intervening events beyond the taxpayer's control, or (b) the taxpayer reasonably relied on a qualified tax professional, including a tax professional employed by the taxpayer, and the tax professional failed to make, or advise the taxpayer to make, the election. Section 301.9100-3(b)(1)(ii) and (v).

The IRS has no record of receiving Decedent's Form 8939, which Executor claims was mailed by Accounting Firm on Date 1. Accounting Firm has provided affidavits claiming to have timely mailed the Form 8939. Affidavits, however, are not prima facie evidence that the Form 8939 was delivered to the IRS. Executor has not provided direct proof of actual delivery or proof that the Form 8939 was sent to the IRS by United States registered or certified mail, or other designated delivery service, and maintains only that the postal service lost the filing. Thus, Executor has failed to present prima facie evidence that the Form 8939 was delivered to the IRS. Accordingly, Decedent's estate failed to timely elect out of the estate tax and is now requesting relief to elect out of the estate tax under § 301.9100-3.

Based on the facts submitted and the representations made, we conclude that the requirements of § 301.9100-3 have not been satisfied. Executor alleges that the United States Postal Service lost the Decedent's Form 8939, claiming that this is an intervening event beyond the taxpayer's control. However, under § 7502 and the corresponding regulations, if Executor had sent the Form 8939 to the IRS by United States registered or certified mail, it would constitute prima facie evidence of delivery to the IRS on the postmark date. Because Executor could have prevented this result, intervening events beyond Executor's control did not cause Executor to fail to make the election under § 301.9100-3(b)(1)(ii).

Furthermore, Executor represents that he relied on a qualified tax professional, and the tax professional failed to inform Executor of mailing methods that would have ensured timely filing. Accounting Firm prepared the Form 8939 and allegedly mailed it prior to the filing due date. The fact that Accounting Firm failed to advise Executor that there are methods other than regular mail for timely filing the Form 8939 does not meet the standard of reasonableness and good faith in § 301.9100-3(b)(1).

Finally, Executor did not provide to the IRS a copy of the allegedly filed Form 8939 until several months after the date the IRS was notified that the estate had opted out of the estate tax by timely filing a Form 8939. Based on all of the facts presented, we do not believe Executor acted reasonably and in good faith. Accordingly, Executor's request for the extension of time to make the Section 1022 Election is denied.

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter.

This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

The rulings contained in this letter are based upon information and representations submitted by the taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. While this office has not verified any of the material submitted in support of the request for rulings, it is subject to verification on examination.

Sincerely,

Leslie H. Finlow  
Senior Technician Reviewer, Branch 4  
Office of Associate Chief Counsel  
(Passthroughs & Special Industries)

Enclosures:  
Copy for section 6110 purposes  
Copy of this letter

cc: