

## **B. DISCRETIONARY RELIEF UNDER REG. 1.9100-1**

### **1. Introduction**

Section 1.9100-1 of the Income Tax Regulations gives the Commissioner discretionary authority to grant a reasonable extension of time fixed by regulations for the making of an election or application for tax relief. In all cases, discretion to grant relief is limited by certain identifiable standards. Relief is sought by exempt organizations in accordance with specified, published procedures. This topic will discuss the standards and procedures applicable to Reg. 1.9100-1 relief in the context of Reg. 1.508-1. However, relief may also be available to organizations that fail to meet the notice requirements of Reg. 1.505(c)-IT. (See page 137 of this text.)

### **2. Background**

IRC 508(a) provides, generally, that organizations organized after October 9, 1969, shall not be treated as organizations described in IRC 501(c)(3) unless they give notice to the Secretary that they are applying for recognition of IRC 501(c)(3) status. Reg. 1.508-1(a)(2)(i) provides that the required "notice" consists of a "properly completed and executed Form 1023, Exemption Application," filed within 15 months from the end of the month in which the organization was organized. The regulation also provides that a request for an extension of time to file the notice should be submitted to the District Director, and that such request will be approved if it is demonstrated that additional time is required. Organizations that do not apply for exemption under IRC 501(c)(3) within the requisite 15-months and do not meet any of the exceptions of IRC 508(c), are granted prospective exemption from the date their Application for Exemption is submitted, rather than from their date of formation. In 1980, the question presented was whether Reg. 1.9100-1 provided authority for granting relief in some cases to organizations that fail to give notice within the 15-month filing period.

Under Reg. 1.9100-1 the Commissioner has discretion, upon a showing of good cause by a taxpayer, to grant a reasonable extension of the time fixed by the regulations for making an election or application for relief in respect to income tax provided:

- (A) the time for making the election or application is not expressly prescribed by the statute;

- (B) the request for the extension is filed with the Commissioner within a period of time the Commissioner considers reasonable under the circumstances; and
- (C) it is shown to the Commissioner's satisfaction that granting the extension will not jeopardize the Government's interests.

While the concept of 1.9100-1 relief in the exempt organizations area is a relatively recent phenomenon, such relief has been available for some time in other areas of tax administration. For example, Technical Information Release 336, dated September 18, 1961, and Rev. Proc. 61-30, 1961-2 C.B. 568, provide that the Service will consider requests for granting extensions of time for the filing of consents by certain shareholders who failed to file timely consents to elections by small business corporations under IRC 1372. Other areas have also been the subject of 1.9100-1 relief.

For our purposes, the key question became whether the notice and filing requirements of IRC 508 and Reg. 1.508-1(a)(2)(i) constitute either an "election" or "application for relief in respect of tax" within the meaning of Reg. 1.9100-1. Because the 508 notice requirements do not involve any sort of choice or alternative for an exempt organization, it was decided that no "election" was present here. However, it was also decided that the 508 notice requirements do constitute an "application for relief in respect of tax," and, therefore, Reg. 1.9100-1 is applicable in these instances. Thus, Reg. 1.9100-1 relief may be granted to organizations that file late if the other requirements of Reg. 1.9100-1 are satisfied. If those requirements are satisfied, then an extension of time under Reg. 1.9100-1 may be appropriate if good cause is shown and the Commissioner, in his discretion, believes relief is warranted.

Rev. Rul. 80-259, 1980-2 C.B. 192, stated for the first time that the Service would consider applying Reg. 1.9100-1 to extend the time for satisfying the notice requirement of IRC 508(a).

### 3. Procedures for Requesting Relief

A number of possibilities are available to an organization that submits its application for exemption beyond the requisite 15-month period of Reg. 1.508-1(a)(2)(i) and does not meet any of the exceptions contained in IRC 508(c). The organization may choose to accept prospective exemption from the date it

submitted its Application Form 1023. However, this may result in tax being due for prior years during which the organization was not exempt, FICA and FUTA problems, and lack of deductibility for donors. If the organization's only problem is exemption from income tax, it may accept prospective exemption under IRC 501(c)(3), and submit an Application Form 1024 requesting exemption under IRC 501(c)(4) for prior years. Rev. Rul. 80-108, 1980-1 C.B. 119, holds that an organization that otherwise qualifies for exemption under both IRC 501(c)(3) and 501(c)(4), but that did not file for recognition of exemption under IRC 501(c)(3) within the requisite 15 months may be exempt under IRC 501(c)(4) from the date of its inception. This would be a good approach for organizations having no problems with respect to FICA and FUTA, or deductibility of contributions. Organizations that need retroactive exemption under IRC 501(c)(3) may request relief under Reg. 1.9100-1.

The requirements for requesting an extension of time for submitting an application are contained in Rev. Proc. 79-63, 1979-2 C.B. 578. An exempt organization requesting such an extension should submit a substantive discussion of the 1.9100-1 standards as they relate to its situation. Section 4.02 of Rev. Proc. 79-63 provides that the information submitted should include a chronological account of the events leading to the failure to make the application. The information should also include the names and current addresses of each person having knowledge or information about the events that led to the failure to make a timely application and all relevant documents. Any other information bearing on the request may be submitted. Requests for extensions of time under Reg. 1.9100-1 and any additional information must be accompanied by the following declaration:

"Under penalties of perjury, I declare that I have examined this request, including accompanying documents, and to the best of my knowledge and belief, the facts presented in support of this request are true, correct and complete."

This declaration must be signed by an officer of the exempt organization who has knowledge of the facts, and not by an authorized representative. Supporting affidavits by an authorized representative or other person must also be accompanied by a comparable declaration.

Although authority to grant discretionary relief under Reg. 1.9100-1 is vested in the Commissioner, Delegation Order 183 (Rev. 1), dated March 21, 1982, delegates the authority to the Associate Chief Counsel (Technical) and the

Assistant Commissioner (EP/EO) and permits the authority to be redelegated to Division Directors and Branch Chiefs.

Under current procedures (IRM 7664.31(5)), all requests for relief under Reg. 1.9100-1 must be referred to the National Office for consideration using the technical advice procedures set forth in Rev. Proc. 80-26. At this writing, however, Delegation Order 183 is being revised to include the District Directors of Employees Plans and Exempt Organizations key districts as officials authorized to grant relief under Reg. 1.9100-1. This would obviate the need for National Office involvement in most cases.

#### 4. Standards for Granting 1.9100-1 Relief

Although all relevant facts are considered in deciding whether an extension of time for filing an application is warranted, the five factors of Rev. Proc. 79-63 are most important. Section 4.01 of Rev. Proc 79-63 contains the following specific standards governing 1.9100-1 relief:

(A) Due diligence of the taxpayer

What action, if any, did the taxpayer take to determine the existence of and requirements for election or application? In this regard, did the taxpayer consult an attorney or accountant knowledgeable in tax matters or communicate with a responsible employee of the Service? Further, what action, if any, did the taxpayer take to make the election or application?

(B) Prompt action by the taxpayer

Is the taxpayer requesting the extension within a reasonable time after discovering a deadline that could not be met or, alternatively, within a reasonable time after discovering a deadline that has already passed? Was the discovery made within a reasonable time after passage of the deadline? Did the taxpayer take reasonable action under all the circumstances to deal promptly with a missed deadline?

(C) Intent of the taxpayer

Did the taxpayer intend to make the election or application on time? If the taxpayer knew of the election or application, was the taxpayer's failure to elect or apply on time due to mere inadvertence or to significant intervening circumstances beyond the taxpayer's control? Have the taxpayer's actions been consistent with the intent to make the particular election or application, or has the taxpayer taken action inconsistent with the intent to make the particular election or application?

(D) Prejudice to the interests of the Government

Would granting the extension neither prejudice the interests of the Government nor cause undue administrative burden? For example, has the taxpayer used or had the opportunity to use hindsight to the Government's prejudice by actions based on knowledge of events occurring after the time when the taxpayer would have had to act in order timely to make the election or application?

(E) Statutory and regulatory objectives

Would granting the extension be consistent with the objectives of the underlying statute and the regulatory election or application provision?

The application of Rev. Proc. 79-63 to a common situation can be illustrated as follows: A charitable organization places its Application Form 1023 in the hands of a knowledgeable attorney or accountant who agrees to submit the Application within the requisite 15-month period, but fails to do so. As soon as the organization discovers that no application for exemption has been submitted and that the 15-month period has passed, it promptly submits its Application Form 1023, and requests relief under Reg. 1.9100-1. All of the facts indicate that the organization had always intended to be exempt under IRC 501(c)(3). There is no reason why granting such relief would prejudice the Government or cause undue administrative burden. Finally, the "notice" requirements of IRC 508 would not be frustrated since the organization had done all that was reasonably necessary to provide notice within the prescribed time. Under the circumstances, relief under

Reg. 1.9100-1 would be appropriate, and the organization's exempt status under IRC 501(c)(3) would be retroactive to its date of formation. In other cases, facts and circumstances unfavorable to the organization might preclude relief under Reg. 1.9100-1. For example, if the organization was dilatory in acquiring the services of an attorney so that he or she does not have adequate time to prepare the application, an adverse ruling might be warranted.

In connection with the "Due Diligence" standard, we have considered several cases where the applicant organization had relied on an attorney or accountant who was also an officer or member of the organization. Since it is reasonable for organizations to rely on the competence of a tax professional, whether that individual is an "insider" or not, we concluded that the "Due Diligence" standard had been met.