

Internal Revenue Service

Department of the Treasury

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Washington, DC 20224

Person to Contact:

Telephone Number:

Refer Reply To:

CC:ITA:2-PLR-136391-02

Date:

September 24, 2002

LEGEND:

Taxpayer	=
Year 1	=
Year 2	=
Accountant	=
Examining officer	=
Firm	=
*	=
**	=

Dear :

This is in response to the taxpayer's letter dated June 28, 2002. The taxpayer requested an extension of time to make a late election to include part of net capital gains from the dispositions of property held for investment in investment income under §§ 163(d)(1) and 163(d)(4)(B) of the Internal Revenue Code for year 1. The request to make the late election is based on §§ 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations.

FACTS

The taxpayer, an individual, had investment interest expense as well as net capital gains from the disposition of property held for investment in year 1. In computing taxable income for year 1, the taxpayer did not elect on Form 4952, Investment Interest Expense Deduction, Line 4e, to include any part of net capital gain in investment income.

The taxpayer relied on Accountant to complete and timely file Form 1040 for year 1. The taxpayer had employed Accountant for several years and was satisfied with Accountant's reputation, competence and ability. Firm did not make or advise Taxpayer to make an election under § 163(d)(4)(B)(iii).

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Subsequently, in an IRS examination of the taxpayer's year 1 Form 1040 in the spring of year 2, the examining officer proposed an increase in tax, based on the failure of the taxpayer to elect to treat capital gains as investment income under § 163(d)(4)(B)(iii) for purposes of the investment interest expense limitation of § 163(d)(1). On *, the taxpayer, through Accountant, contacted Firm to assist in responding to the examining officer's proposed adjustment. The taxpayer represents that after examining its situation with Accountant and Firm, they discussed with the examining officer the feasibility of pursuing a private letter ruling request under § 301.9100, and that on **, the examining officer advised them that she had obtained approval for them to pursue a private letter ruling request with the National Office while the case was pending in her office.

APPLICABLE LAW

Section 163(d)(1) provides that, in the case of a taxpayer other than a corporation, the amount allowed as a deduction for investment interest for any taxable year shall not exceed the net investment income of the taxpayer for the taxable year. Section 163(d)(4)(B) provides, in pertinent part, that investment income means the sum of --

- (i) gross income from property held for investment (other than any gain taken into account under clause (ii)(I)),
- (ii) the excess (if any) of --
 - (I) the net gain attributable to the disposition of property held for investment, over
 - (II) the net capital gain determined solely by taking into account gains and losses from dispositions of property held for investment, plus
- (iii) so much of the net capital gain referred to in clause (ii)(II) (or, if lesser, the net gain referred to in clause (ii)(I)) as the taxpayer elects to take into account under this clause.

Section 1.163(d)-1(b) of the Income Tax Regulations provides that the election under § 163(d)(4)(B)(iii) must be made on or before the due date (including extensions) of the income tax return for the taxable year in which the net capital gain is recognized.

Sections 301.9100-1 through 301.9100-3 provide the standards the Commissioner uses to determine whether to grant an extension of time to make a regulatory election. Section 301.9100-2 provides automatic extensions of time for making certain elections. Section 301.9100-3 provides extensions of time for making elections that do not meet the requirements of § 301.9100-2.

Section 301.9100-1(b) defines the term "regulatory election" as an election whose due date is prescribed by a regulation published in the Federal Register, or a revenue ruling, revenue procedure, notice or announcement published in the Internal Revenue Bulletin.

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Section 301.9100 -1(c) provides that the Commissioner may grant a reasonable extension of time to make a regulatory election, or a statutory election (but no more than six months except in the case of a taxpayer who is abroad), under all subtitles of the Internal Revenue Code except subtitles E, G, H, and I.

Section 301.9100-3(a) provides that requests for extensions of time for regulatory elections (other than automatic changes covered under § 301.9100-2) will be granted when the taxpayer provides 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 that a taxpayer will be deemed to have acted reasonably and in good faith if the taxpayer --

- (i) requests relief before the failure to make the regulatory election is discovered by the Service;
- (ii) inadvertently failed to make the election because of intervening events beyond the taxpayer's control;
- (iii) failed to make the election because, after exercising due diligence, the taxpayer was unaware of the necessity for the election;
- (iv) reasonably relied on the written advice of the Service; or
- (v) reasonably relied on a qualified tax professional, and the tax professional failed to make, or advise the taxpayer to make the election.

Section 301.9100-3(b)(3) provides that a taxpayer will not be considered to have acted reasonably and in good faith if the taxpayer --

- (i) seeks to alter a return position for which an accuracy-related penalty could be imposed under § 6662 at the time the taxpayer requests relief and the new position requires a regulatory election for which relief is requested;
- (ii) was fully informed of the required election and related tax consequences, but chose not to file the election; or
- (iii) uses hindsight in requesting relief. If specific facts have changed since the original deadline that make the election advantageous to a taxpayer, the Service will not ordinarily grant relief.

Section 301.9100-3(c)(1) provides that the Commissioner will grant a reasonable extension of time only when the interests of the Government will not be prejudiced by the granting of relief. Under paragraph (c)(1)(i), the interests of the government are prejudiced if granting relief would result in a taxpayer having a lower tax liability in the aggregate for all taxable years affected by the election than the taxpayer would have had if the election had been timely made. Under paragraph (c)(1)(ii), the interests of the government are ordinarily prejudiced if the taxable year in which the regulatory election should have been made is closed by the period of limitations on assessment under § 6501(a) before the taxpayer's receipt of a ruling granting relief under this

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section.

DISCUSSION

The taxpayer's election is a regulatory election, as defined under § 301.9100-1(b), because the due date of the election is prescribed in the regulations under § 1.163(d)-1(b).

In the present situation, the requirements of §§ 301.9100-1 and 301.9100-3 have been satisfied. The information and representations made establish that Taxpayer acted reasonably and in good faith with this request. It has been represented that the taxpayer was unaware of the necessity for the election at the due date of the income tax return for year 1. It has been represented that the taxpayer reasonably relied on Accountant, a qualified tax professional, which failed to make or advise the taxpayer to make an election under § 163(d)(4)(B)(iii).

Furthermore, granting an extension will not prejudice the interests of the Government. The taxpayer has represented that granting relief will not result in the taxpayer having a lower tax liability in the aggregate for years 1 and 2 than the taxpayer would have had if the election had been timely made. The taxpayer has also represented that year 1, in which the regulatory election should have been made, will not be closed by the period of limitations on assessment under § 6501(a) before the taxpayer's receipt of the ruling granting an extension of time to make a late election.

RULING

The taxpayer is granted an extension of time for making the election until 60 days following the date of this ruling. The election should be made by filing Form 4952 and by including a copy of this ruling with an amended return for year 1.

This ruling is based upon information and representations submitted by the taxpayer and accompanied by a penalty of perjury statement. While this office has not verified any of the material submitted in support of the request for ruling, it is subject to verification on examination.

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

This letter is sent under the provisions of a power of attorney on file with this office. A copy of the letter is being sent to the taxpayer.

This ruling is directed only to the taxpayer who requested it. Section 6110(k)(3)

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provides that it may not be used or cited as precedent.

Sincerely yours,
Thomas D. Moffitt
Chief, Branch 2
Office of Associate Chief Counsel
(Income Tax & Accounting)

Attachments:
Copy of this letter
Copy for § 6110 purposes