

Internal Revenue Service

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Department of the Treasury
Washington, DC 20224

Third Party Communication: None
Date of Communication: Not Applicable

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Date:
September 29, 2006

Legend

Taxpayer 1
Taxpayer 2
Parent
Accounting Firm 1
Accounting Firm 2
Date 1
Date 2
Date 3
Date 4

Dear :

This is in reply to your private letter ruling request dated October 6, 2004, in which you request an extension of time on behalf of Taxpayers 1 and 2 to make an election under § 311(e) of the Taxpayer Relief Act of 1997 (§ 311(e) election) for their respective taxable years ending on Date 2.

Facts

During the year at issue, Taxpayers 1 and 2 were partnerships, each of which had a general partner and a limited partner. All the partners of Taxpayers 1 and 2 were corporations. Parent was the common domestic parent of the four partners (a consolidated group). Taxpayer 1 had a long-term leasehold interest in and operated a hotel. Taxpayer 2 owned and operated a hotel.

In Date 1, a representative from Accounting Firm 1 met with members of the tax department of Parent. The representative from Accounting Firm 1 suggested to Parent that it have Taxpayers 1 and 2 make a § 311(e) election with respect to the real property assets on its tax return for its taxable year ending on Date 2, which was on extension until Date 3. The tax department of Parent considered having Taxpayers 1 and 2 make the § 311(e) election, which would have been reflected on the partners' (and Parent's) tax returns, but Taxpayers 1 and 2 did not make the § 311(e) election on their respective tax returns.

During Date 4, Accounting Firm 2 was engaged by Parent to review previously-filed tax returns. As part of this review, Accounting Firm 2 suggested to the tax department of Parent that the § 311(e) election be further explored. Taxpayers 1 and 2 now seek an extension of time to make the election.

Law

For non-corporate taxpayers during the year at issue, gain resulting from the sale or exchange of most capital assets was taxed under § 1(h) at a 20-percent capital gains rate (10-percent for gain otherwise taxed at ordinary rates of 15 percent or less). Section 1(h) also provided that the 20-percent capital gains rate was reduced to 18 percent for qualified 5-year gain (aggregate long-term capital gain from property held for more than 5 years) resulting from the sale or exchange of property with a holding period beginning after December 31, 2000.

Section 311(e) of the Taxpayer Relief Act of 1997 was a transition rule that allowed a non-corporate taxpayer holding a capital asset or § 1231 asset on January 1, 2001, to elect to treat that asset as having been both sold and reacquired on that date for an amount equal to its fair market value. If a taxpayer made a § 311(e) election, the holding period for the elected asset began after December 31, 2000. This made the asset eligible for the 18-percent capital gains rate if it was later sold after having been held by the taxpayer for more than 5 years from the date of the deemed sale and reacquisition.

A taxpayer made a § 311(e) election by following the instructions for the appropriate Schedule D or Form 4797, which state that the tax return on which the gain is reported must be filed by its due date, including extensions. Taxpayers who timely filed their tax returns without making the § 311(e) election for one or more eligible assets could still make the election by filing an amended return within 6 months of the due date of the original return, excluding extensions.

The 2001 Schedule D instructions for Form 1065 explain that "Partnerships may elect to treat certain assets held on January 1, 2001, as having been sold and then required on the same date. The purpose of the election is to make future gain on the asset eligible

for an 18% (instead of 20%) capital gain tax rate at the partner level.” See also H.R. Conf. Rep. No. 105-220, at 383 (1997).

Under appropriate circumstances, the Internal Revenue Service will grant requests to make a late § 311(e) election under §§ 301.9100-1 through 301.9100-3 of the Procedure and Administration Regulations. Notice 2002-58, 2002-2 C.B. 432.

Section 301.9100-1(a) of the regulations states that an extension of time is available for elections that a taxpayer is otherwise eligible to make. However, the granting of an extension of time is not a determination that the taxpayer is otherwise eligible to make the election.

Section 301.9100-3(a) of the regulations provides that requests for extensions of time for regulatory elections will be granted when the taxpayer establishes 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)(3)(ii) of the regulations provides that a taxpayer is deemed to have not acted reasonably and in good faith if the taxpayer was informed in all material respects of the required election and related tax consequences, but chose not to file the election.

Analysis

The tax department of Parent, the common domestic parent of the partners of Taxpayers 1 and 2, was informed in all material respects of the election and related tax consequences by Accounting Firm 1, but chose not to file the § 311(e) election. Taxpayers 1 and 2 acknowledge that they were advised by Accounting Firm 1 that they were eligible to make the § 311(e) election and that they considered making the election. Taxpayers also acknowledge that they prioritized the work of the tax department and decided that the § 311(e) election was not worth pursuing in light of other matters it had to consider at the time. All of this indicates that Taxpayers 1 and 2 made a considered choice not to make the § 311(e) election and thus, fail to meet the requirements of section 301.9100-3 of the regulations.

Regardless, Taxpayers 1 and 2 are not eligible to make the § 311(e) election because they are partnerships with only corporate partners. The § 311(e) election was a transitional rule to permit non-corporate taxpayers to avail themselves of the 18-percent capital gains rate of § 1(h) then in effect, which did not apply to corporate taxpayers.

Accordingly, Taxpayers 1's and 2's request for relief under § 301.9100-3 of the regulations is denied.

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.

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to your authorized representative.

Sincerely,

Christopher F. Kane
Branch Chief, Branch 3
(Income Tax & Accounting)

cc: