



DEPARTMENT OF THE TREASURY  
INTERNAL REVENUE SERVICE  
WASHINGTON, D.C. 20224

OFFICE OF  
CHIEF COUNSEL

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MEMORANDUM FOR DARLENE ROBERTS  
Tax Technician,

FROM: David B. Auclair  
Senior Technician Reviewer, Branch 1  
(Income Tax and Accounting)

SUBJECT: Timeliness of Election under Former § 121

This responds to your telephone inquiry for technical assistance regarding the timeliness of an election under former § 121.

ISSUE

Is an election to exclude gain on the sale of a principal residence under former § 121 timely if the election is made more than three years from the time the return for the year of sale was filed, but within two years from the payment date of the tax on the gain from the sale?

CONCLUSION

The election under former § 121 is timely if it is made at any time before the expiration of the period for making a claim for refund under § 6511 for the year in which the sale or exchange occurred. Therefore, an election is timely if it is made within two years from the payment date of the tax on the gain from the sale of the residence.

FACTS

Under § 1034, prior to its repeal by the Taxpayer Relief Act of 1997 ("the 1997 Act"), Pub. L. No. 105-34, 111 Stat. 788, a taxpayer who sold a principal residence and purchased a new principal residence within two years could roll over all or part of the gain on the sale of the old residence. Under § 121, prior to its amendment by the 1997 Act, a taxpayer who had attained the age of 55 on the date of the sale

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also had a one-time election to exclude permanently up to \$125,000 of gain on the sale of the taxpayer's principal residence.

Taxpayers who sold a principal residence and planned to roll over the gain under § 1034 were required to report the original sale on Form 2119, *Sale of Your Home*, even if they had not yet purchased a replacement home. They were then required to file a second Form 2119, reflecting whether or not they purchased a qualifying replacement residence and reporting any resulting gain. The period for assessing a deficiency attributable to such gain generally did not expire until three years after the filing of the second Form 2119. See former § 1034(j); Reg. § 1.1034-1(i).

Your office contacted taxpayers who had originally filed Form 2119, but who had not filed a second Form 2119 within the two-year replacement period. In a number of cases, the taxpayers had failed to purchase a qualifying replacement home, and a deficiency was accordingly assessed. More than three years after filing their original returns, but within two years after paying the deficiency, certain taxpayers, who had met the qualifications for the one-time § 121 election at the time of their original sale, filed refund claims based on the election.

## DISCUSSION

Section 121(c), as in effect prior to the 1997 Act, provided that the election to exclude gain from the sale or exchange of a principal residence may be made at any time before the expiration of the period for making a claim for credit or refund of the tax imposed for the year in which the sale or exchange occurred.

Under § 6511, a claim for credit or refund must generally be filed within three years from the time the return was filed, or two years from the time the tax was paid, whichever is later. (A return filed before the due date is treated as filed on the due date. See § 6513.)

Accordingly, a taxpayer who claims the § 121 election within two years after paying tax on the gain from the sale of the residence has made a timely election. Such a taxpayer is entitled to exclude gain under former § 121 provided the taxpayer meets the § 121 requirements on the date of the sale. See Publication 523, *Selling Your Home*, p. 32 (Rev. March 1999).

If you have further questions regarding §§ 121 or 1034, please contact Sara P. Shepherd at (202) 622-4910. If you have further questions regarding § 6511, please contact Andrew M. Irving at (202) 622-4930.