

F. INCOME TAX REGULATION 301.9100-1

by

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1. Introduction

To enforce the rules applicable to charitable and other exempt organizations, the Service must be able to identify the organizations. Congress recognized this when it enacted IRC 508(a) and IRC 505(c), which require organizations that claim the tax benefits of exemption under IRC 501(c)(3), (9), (17), or (20) to give notice to the Service that they are applying for recognition of exemption.

Unfortunately, many organizations that believe they are exempt fail to give the notice in the manner prescribed by the regulations under IRC 508(a) and IRC 505(c). Under the rules, those organizations do not qualify for exemption during the period they failed to give notice. However, Reg. 301.9100-1, as revised, permits the Commissioner to grant relief to organizations that do not give timely notice under certain circumstances. Rev. Rul. 92-85, 1992-42 I.R.B. 32, was issued to implement Reg. 301.9100-1.

2. Background

These notice requirements concerning exempt organizations are in Subtitle A, IRC 508(a) and IRC 505(c). Under IRC 508(a), an organization organized after October 9, 1969, will not be treated as an IRC 501(c)(3) entity unless that organization provides notice to the Secretary that it is applying for recognition of that status. Reg. 1.508-1(a)(2)(i) states that "an organization seeking exemption under IRC 501(c)(3) must file the notice described in IRC 508(a) within fifteen months from the end of the month in which the organization was organized...." Reg. 1.508-1(a)(2)(i) also states that this notice requirement is met by submitting a properly completed and executed Form 1023 exemption application to the Service.

IRC 505(c) requires an organization seeking exemption under IRC 501(c)(9), (17), or (20) to provide similar notice; otherwise, the organization will not be treated as an organization described in (9), (17), or (20) of IRC 501(c). Reg. 1.505(c)-1T states that trusts seeking exemption under IRC 501(c)(20) need not file a separate application if they have satisfied the notice requirement of IRC 120(c)(4). Reg. 1.505(c)-1T also states that organizations seeking exemption

under IRC 501(c)(9) and (17) provide notice when they file a properly completed and executed Form 1024 within fifteen months from the end of the month of their formation.

Prior to the promulgation of Reg. 301.9100-1 by Treasury Decision 8378, organizations that failed to provide notice as required under IRC 508(a) or IRC 505(c) sought relief under former Reg. 1.9100-1, the predecessor to Reg. 301.9100-1. To implement former Reg. 1.9100-1, the Service issued Rev. Proc. 79-63, 1979-2 C.B. 578. After the adoption of Reg. 301.9100-1, the Service issued Rev. Proc. 92-85, 1992-42 I.R.B. 32, discussed infra, which has superseded Rev. Proc. 79-63.

3. Reg. 301.9100-1

Reg. 301.9100-1 states that the Commissioner may, in his or her discretion, grant a reasonable extension of the time fixed by regulations for making an election or application for relief of tax under all subtitles of the Code (except subtitles E, G, H, and I), provided:

- a. The time for making such election or application is not expressly prescribed by statute;
- b. Request for the extension is filed with the Commissioner before the time fixed for making such election or application, or within such time as the Commissioner may consider reasonable under the circumstances; and
- c. It is shown to the satisfaction of the Commissioner that the granting of the extension will not jeopardize the interests of the Government.

To implement Reg. 301.9100-1, the Service issued Rev. Proc. 92-85, 1992-42 I.R.B. 32.

4. Rev. Proc. 92-85, 1992-42 I.R.B. 32

Rev. Proc. 92-85 revises and liberalizes the standards by which the Commissioner will grant an extension of the time fixed by regulations for making an election or application for relief concerning Subtitle A of the Code. Under Rev. Proc. 92-85, there are two methods in which organizations seeking exemption may

receive an extension of time to provide notice to the Service as required under IRC 508(a) or IRC 505(c).

A. Extension Under Section 4

Sec. 4.01 of Rev. Proc. 92-85 grants an automatic 12-month extension to organizations so that they can meet the notice requirement of IRC 508(a) or IRC 505(c), provided they take corrective action within twelve months of the original deadline. Corrective action means, for exempt organization purposes, filing an application for recognition of exemption with the Service. Under the automatic extension, organizations will have twenty-seven months from the date of formation to file an application, i.e., fifteen months under IRC 508(a) or 505(c) plus the automatic 12-month extension.

Sec. 10 of Rev. Proc. 92-85 states that 4.01 is effective for organizations whose deadline for filing their applications falls on or after October 1, 1992. To obtain the automatic extension, an organization must state, on the top of its application, "Filed Pursuant to Rev. Proc. 92-85."

B. Extension Under Section 5

Organizations that fail to file their applications for recognition of exemption within the extended period prescribed in 4.01 may seek relief under 5 of Rev. Proc. 92-85. Under 5, an organization is granted an extension to file if it submits evidence to establish that it acted reasonably and in good faith, and if granting that relief will not prejudice the interests of the government.

(1) Reasonable Action and Good Faith

Sec. 5.01(1) states that reasonable action and good faith is satisfied when an organization applies for relief before the failure to file its application for recognition of exemption is discovered by the Service. That is, when an organization files its application before the Service has knowledge that it had not filed, that organization will be considered to have acted reasonably and in good faith.

Where the Service becomes aware of an organization's failure to file before the organization files its application for exemption, 5.01(2) states that with regard to the request for relief, reasonable action and good faith is satisfied if that organization meets one of three conditions. (1) The organization must have

inadvertently failed to file due to intervening events beyond its control, or after exercising reasonable diligence it was unaware of the necessity of filing. Reasonable diligence includes consideration of the complexity of filing and the experience the organization has in dealing with such matters. (2) The organization must have reasonably relied upon the written advice of the Service, or (3) relied upon the advice of a qualified tax professional who failed to file or advise the organization to file the application. Under 5.01(3), an organization cannot rely upon the advice of a tax professional if it knew or should have known that the tax professional was not competent to render advice on filing exemption applications or was not aware of all relevant facts.

An organization has not acted reasonably and in good faith when it chooses not to file although it has been informed of the requirement to file and the consequences of the failure to do so. Furthermore, an organization has not acted reasonably and in good faith if it uses hindsight to request extension of time to file. That is, if facts changed since the original deadline to file passed that make filing an application advantageous to an organization, the Service will not ordinarily grant an extension. To qualify, the organization must prove that its decision to file did not involve hindsight. See 5.01(4) and (5). It is unlikely that this provision would come into play with regard to an exempt organization since it would not ordinarily be advantageous tax-wise to delay applying for recognition of exemption.

(2) Prejudice to the Interests of the Government

Sec. 5.02(1) discusses the meaning of "prejudice to the interests of the government." Prejudice to the interests of the government would exist if granting relief to an organization would result in lower tax liability in total for all years to which the filing applies than would have been the case if the organization had filed on time. If the taxes of more than one organization are affected by the filing, the government's interest is prejudiced if, by extending the time to file, the organizations, in total, would have a lower tax liability than if the filing had been made on time. The Service may require an organization to submit a statement from an independent auditor certifying that the requirements of 5.02(1) are satisfied before granting relief.

The practical application of the above to exempt organizations means that an organization filing a late exemption application will not prejudice the interests of the government so long as it has been organized and/or operated in an exempt manner from its date of formation. Since this would be a requirement for granting

retroactive exemption in any case, whether the application was filed timely or not, it is not an additional factor in qualifying for relief.

(3) Procedure for Requesting Extension Under Section 5

Sec. 6 of Rev. Proc. 92-85 states that if an organization is to meet the requirements set forth in 5.01 and 5.02, it must submit to the Service the following information:

A statement as to when the document used to make the election should have been filed and when it was actually filed. This would be accomplished by submitting a completed Form 1023 for IRC 508(a) purposes or attaching such a statement to a Form 1024 for IRC 505(c) purposes.

A detailed affidavit describing the events that led to the failure to make the election or application and to the discovery of that failure. If that organization relied upon a tax professional for advice, the affidavit must describe the engagement and responsibilities of the professional as well as the extent to which it relied on the professional.

All documents relevant to the election or application.

Dated declaration, signed by an individual authorized to act for the organization, which states: "Under penalties of perjury, I declare that, to the best of my knowledge and belief, the facts presented herein are true, correct, and complete." The individual who signs for the organization must have personal knowledge of the facts and circumstances at issue.

Sec. 6 also requires an organization to submit to the Service a detailed affidavit from individuals having knowledge or information about the events that led to the failure to make an election or application and to the discovery of that failure.

These individuals include accountants or attorneys knowledgeable in tax matters who advised the organization concerning the election or application. Any affidavit from a tax professional must describe the engagement and responsibilities of the professional, as well as the advice that the professional

provided to the organization, and must include the name, current address, and taxpayer identification number of the affiant. It must be accompanied by a dated declaration, signed by the affiant, which states: "Under the penalties of perjury, I declare that, to the best of my knowledge and belief, the facts presented herein are true, correct, and complete."

5. Authority to Grant Relief Under Reg. 301.9100-1

Delegation Order 183 (Rev. 5), issued on March 4, 1993, authorizes the Assistant Commissioner (Employee Plans and Exempt Organizations) to grant a reasonable extension of the time for making of an election or application for relief under Reg. 301.9100-1 and also authorizes the District Directors of EP/EO key districts to grant similar relief with regard to IRC 508(a) and 505(c) matters.

For National Office matters, the Assistant Commissioner (Employee Plans and Exempt Organizations) has redelegated authority to the Director of the Exempt Organizations Technical Division through Delegation Order 14 (Rev. 3). In turn, the Director has delegated the authority to the Executive Assistant and the Rulings Branch Chiefs within the Exempt Organizations Technical Division. Similarly, for field matters, the authority has been redelegated to the Chiefs of the Technical/Review Staffs.

These delegations of authority mean that in all exemption application cases involving IRC 508(a) and 505(c) that are handled in the field, the key district office has the authority to grant Reg. 301.9100-1 relief in appropriate cases. The National Office has such authority in applications referred there for handling and in cases where relief is requested after the issuance of an initial determination letter.

6. Summary

With the publication of Rev. Proc. 92-85, the standards for implementation of the relief provisions of Reg. 301.9100-1 were significantly liberalized. First, an automatic extension of twelve months was introduced for organizations that voluntarily file their requests within one year of the expiration of the original deadline. Second, those organizations that do not file within this extended time but that nevertheless do file their requests before their failure to do so is discovered by the Service will be presumed to have acted reasonably and in good faith. In such cases, relief will be granted so long as doing so will not prejudice the interests of the government, i.e., so long as the organization's overall tax liability is not less

than it would have been had they originally filed timely.

The majority of exempt organization applications in which Reg. 301.9100-1 relief would be applicable should qualify for the automatic 12-month extension. Most of the rest would qualify for relief under 5 of Rev. Proc. 92-85, because they would have filed on their own before coming to the attention of the Service and, assuming they operated in an exempt manner from the date of their creation, the government's interest would not be jeopardized. It is only those organizations whose failure to file is discovered on examination or by the filing of a Form 990, Return for Organizations Exempt from Income Tax, before submitting an exemption application, that will have to comply with the additional affidavit requirements of 6 of Rev. Proc. 92-85.