

Internal Revenue Service

Department of the Treasury

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Washington, DC 20224

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Telephone Number:

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CC:CORP:B1-PLR-106576-03
Date:
April 7, 2003

Legend:

Lossco =

Outside Tax Professional =

Date 1 =

Date 2 =

Date 3 =

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X =

State C =

Company Officer =

Dear :

This responds to a letter dated January 29, 2003 submitted on behalf of Lossco requesting an extension of time under § 301.9100-3 of the Procedure and Administration Regulations to file an election. Lossco is requesting an extension to file a "closing-of-the-books election" pursuant to § 1.382-6(b) of the Income Tax Regulations (the "Election"), with respect to a transaction that occurred on Date 1. Additional information was received in letters dated March 4, 2003 and March 20, 2003. The material information is summarized below.

Lossco, a State C corporation, is engaged in Business I. Lossco computed its Federal income tax liability using an accrual method of accounting and filed its Federal income tax returns on a calendar year basis.

On Date 1, Lossco issued X shares of preferred stock. The preferred stock issuance resulted in an ownership change as defined in § 382(g) of the Internal Revenue Code. For the entire tax year ending on Date 2, the net operating loss for Lossco was \$h.

The Election was due on Date 3, the extended due date for Lossco's Federal income tax return, but for various reasons it was not filed. Subsequently this request was submitted, under § 301.9100-3, for an extension of time to file the Election. The period of limitations on assessment under § 6501(a) has not expired for the taxable year for which Lossco's Election should have been filed or subsequent years.

The following representations have been made in connection with this request:

(1) Lossco was a loss corporation as defined in § 382(k)(1) and § 1.382-2(a)(1) for the tax year ending Date 2.

(2) Lossco did not accelerate income into the pre-change period or defer loss to the post-change period for the purpose of avoiding the application of § 382(b).

(3) Lossco was not under the jurisdiction of a court in a Title 11 or similar case.

(4) Lossco will determine its alternative minimum taxable income and adjusted current earnings for the pre-change and post-change periods based on a closing-of-the-books election as of the ownership change date, and will elect out of ratable allocation.

(5) Since Date 1, Lossco has continued the operation of its historic trade or business.

(6) Lossco has not carried back and will not carry back under § 172 any portion of the net operating loss it incurred in the tax year ended on Date 2 to a prior tax year.

(7) An election under § 338 was not made in connection with the Date 1 transaction.

Section 1.382-6(a) provides that, except as provided in paragraphs (b) and (d) of the section, a loss corporation must allocate its net operating loss or taxable income and its net capital loss or modified capital gain net income for the change year between the pre-change period and the post-change period by ratably allocating an equal portion to each day in the year.

Section 1.382-6(b)(1) provides that a loss corporation may elect to allocate its net operating loss or taxable income and its net capital loss or modified capital gain net income for the change year between the pre-change period and the post-change period as if the loss corporation's books were closed on the change date.

Section 1.382-6(b)(2) provides that a loss corporation makes the closing-of-the-books election by including the following statement on the information statement required by

§ 1.382-2T(a)(2)(ii) for the change year: "THE CLOSING-OF-THE-BOOKS ELECTION UNDER § 1.382-6(b) IS HEREBY MADE WITH RESPECT TO THE OWNERSHIP CHANGE OCCURRING ON [INSERT DATE]." The election must be made on or before the due date (including extensions) of the loss corporation's income tax return for the change year.

Under § 301.9100-1(c), the Commissioner has discretion to 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.

Sections 301.9100-1 through 301.9100-3 provide the standards the Commissioner will use to determine whether to grant an extension of time to make a regulatory election. Section 301.9100-1(a). Section 301.9100-2 provides automatic extensions of time for making certain elections. Requests for relief under § 301.9100-3 will be granted when the taxpayer provides evidence to establish 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(a).

In this case, the time for filing the Election is fixed by the regulations (i.e., § 1.382-6(b)(2)). Therefore, the Commissioner has discretionary authority under § 301.9100-3 to grant an extension of time for Lossco to file the Election, provided Lossco shows it acted reasonably and in good faith, the requirements of §§ 301.9100-1 and 301.9100-3 are satisfied, and granting relief will not prejudice the interests of the government.

Information, affidavits, and representations submitted by Lossco, Company Officer, and Outside Tax Professional explain the circumstances that resulted in the failure to timely file a valid Election. The information establishes that the request for relief was filed before the failure to make the Election was discovered by the Internal Revenue Service and that the interests of the government will not be prejudiced if relief is granted. See § 301.9100-3(b)(1)(i). The information also establishes that Lossco reasonably relied on a qualified tax professional and the tax professional failed to make, or advise the taxpayer to make, the election. See § 301.9100-3(b)(1)(v).

Based on the facts and information submitted, including the representations made, we conclude that Lossco has shown it acted reasonably and in good faith, the requirements of §§ 301.9100-1 and 301.9100-3 are satisfied, and granting relief will not prejudice the interests of the government. Accordingly, an extension of time is granted under § 301.9100-3, UNTIL 45 DAYS FROM THE DATE ON THIS LETTER, for Lossco to file the Election.

WITHIN 120 DAYS OF THE DATE ON THIS LETTER, Lossco must file or amend, as applicable, its income tax returns for all open taxable years affected by the Election and to attach to the returns a copy of the Election, a copy of the information statement (if one has not already been attached), and a copy of this letter.

The above extension of time is conditioned on Lossco's tax liability (if any) being not

lower, in the aggregate, for all years to which the Election applies, than it would have been if the Election had been timely made (taking into account the time value of money).

No opinion is expressed as to the Lossco's tax liability for the years involved. A determination thereof will be made by the applicable Director's office upon audit of the Federal income tax returns involved. Further, no opinion is expressed as to the Federal income tax effect, if any, if it is determined that Lossco's tax liability is lower. Section 301.9100-3(c).

We express no opinion as to: (1) whether Lossco is a "loss corporation", as defined in § 382(k)(1) and § 1.382-2(a)(1), or (2) whether an ownership change, as defined in § 382(g) and § 1.382-2T(a)(1) occurred on Date 1; or (3) any other tax consequences arising from the Election.

In addition, we express no opinion as to the tax consequences of filing the Election late under the provisions of any other section of the Code and regulations, or as to the tax treatment of any conditions existing at the time of, or resulting from, filing the Election late that are not specifically set forth in the above ruling. For purposes of granting relief under § 301.9100-3, we relied on certain statements and representations made by the taxpayer. However, the Director should verify all essential facts. In addition, notwithstanding that an extension is granted under section 301.9100-3 to file the Election, penalties and interest that would otherwise be applicable, if any, continue to apply.

This ruling is directed only to the taxpayer(s) requesting it. Section 6110(k)(3) of the Code 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,

Ken Cohen
Senior Technician Reviewer, Branch 3
Office of Associate Chief Counsel
(Corporate)