

## Internal Revenue Service

Department of the Treasury  
Washington, DC 20224

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Third Party Communication: None  
Date of Communication: Not Applicable  
Person To Contact:

, ID No.

Telephone Number:

Refer Reply To:

CC:ITA:3

PLR-133760-08

Date:

January 26,2009

Year x =

Year y =

Accountant =

Law Firm =

Dear :

This responds to your letter requesting an extension of time under §§ 301.9100-1 and -3 of the Procedure and Administration Regulations to make a late election to include net capital gains from the disposition of property held for investment in investment income under § 163(d)(1) and §163(d)(4)(B)(iii) of the Internal Revenue Code for Year x.

### FACTS

Your letter states that you had net capital gain income in Year x as a result of the sale of investment property held in pass-through entities. Accountant prepared your tax return for Year x, but did not advise you to make an election under § 163(d)(4)(B)(iii). Accountant was unaware that the capital gain resulting from the sale of the pass-through entities' property constituted investment income. In Year y, Law Firm reviewed the return for Year x and discovered that an election had not been made under § 163(d)(4)(B)(iii). Law Firm advised you to seek an extension of time to make a late election.

### APPLICABLE LAW

Section 163(d) provides that, in the case of a taxpayer other than a corporation, the amount allowed as a deduction for investment interest shall not exceed the net investment income of the taxpayer for the taxable year.

Section 163(d)(4)(B) defines investment income, in general, as the sum of

- (i) gross income from property held for investment (other than 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 by only 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)(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.

Section 301.9100-3 of the Procedure and Administration regulations generally provides extensions of time for making regulatory elections. For this purpose § 301.9100-1(b) defines the term “regulatory election” to include an election whose deadline is prescribed by a revenue ruling, revenue procedure, notice or announcement published in the Internal Revenue Bulletin.

Section 301.9100-3 provides that requests for extensions of time for regulatory elections will be granted when the taxpayer provides evidence (including affidavits described in the regulations) to establish to the satisfaction of the Commissioner that the taxpayer acted reasonably and in good faith and granting relief will not prejudice the interests of the government.

Section 301.9100-3(b)(1) states that a taxpayer will be deemed to have acted reasonably and in good faith if the taxpayer<sup>B</sup>

- (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.

The affidavits presented show that you acted reasonably and in good faith, having reasonably relied on Accountant, a qualified tax professional who failed to make, or advise you to make, the election. Furthermore the affidavits presented show that, after exercising due diligence, you were unaware of the necessity for the election. In addition, you requested relief before the failure to make the regulatory election was discovered by the Service.

Under § 301.9100-3(b)(3), 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 has been or could be imposed under § 6662 at the time the taxpayer requests relief (taking into account § 1.6664-2(c)(3) of the Income Tax Regulations) and the new position requires a regulatory election for which relief is requested;
- (ii) was informed in all material respects 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.

You are not seeking to alter a return position for which an accuracy-related penalty has been or could be imposed under § 6662 at the time relief is requested. You were not informed in all material respects of the required election, and its related tax consequences. Furthermore you are not using hindsight in requesting relief. You have represented that specific facts have not changed since the original deadline that make the election advantageous to you.

Section 301.9100-3(c)(1)(i) provides, in part, that the interests of the government are prejudiced if granting relief would result in the 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 (taking into account the time value of money). Section 301.9100-3(c)(1)(ii) provides, in part, that the interests of the government are ordinarily prejudiced if the taxable year in which the regulatory election should have been made, or any taxable years that would have been affected by the election had it been timely made, are closed by the period of limitations on assessment. Under these criteria, the interests of the government are not prejudiced in this case. You have represented that granting relief would not result in your having a lower tax liability in the aggregate for all taxable years affected by the election than you would have had if the election had been timely made (taking into account the time value of money). Furthermore, the taxable year in which the regulatory election should have been made and any taxable years that would have been affected by the election had it been timely made, are not closed by the period on assessment.

Accordingly, the consent of the Commissioner is hereby granted for an extension of time to file the forms necessary to make the election to include net capital gains from the disposition of property held for investment in investment income for Year x. This extension shall be for a period of 60 days from 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 x. We enclose a copy of the letter for this purpose.

No opinion is expressed as to the application of any other provision of the Code or the regulations which may be applicable under these facts. This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.

Enclosed is a copy of the letter ruling showing the deletions proposed to be made in the letter when it is disclosed under § 6110 of the Internal Revenue Code.

This ruling is based upon information and representations submitted by 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 rulings, it is subject to verification on examination.

Sincerely,

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

cc: