

ID: CCA_2016031411175453

UILC: 172.01-00, 9100.00-00

Number: **201616009**

Release Date: 4/15/2016

From: [REDACTED]

Sent: Monday, March 14, 2016 11:17:54 AM

To: [REDACTED]

Cc:

Bcc:

Subject: Your question

You have asked us whether the IRS has discretion to accept a section 172(b)(3) election that was not filed by the extended due date of the tax return which reported the net operating loss (NOL). Our response is no, the IRS does not have discretion to accept such a late-filed election. Although a taxpayer may not make a late section 172(b)(3) election, a taxpayer may still be able to carryback the NOL if amended returns are filed within the limitation period stated in Internal Revenue Code (IRC) section 6511(d)(2).

IRC section 173(b)(3) allows a taxpayer to elect to relinquish the carryback period and carryforward the NOL without first carrying it back to prior years. Section 173(b)(3) explains that a taxpayer must make this election by the due date (including extensions) for filing the return for the taxable year of the NOL for which the election is to be in effect. If a taxpayer fails to timely make certain elections under the IRC, then the regulations under Treasury Regulation section 301.9100 may provide relief.

Treas. Reg. Section 301.9100-1(a) states that the regulations under sections 301.9100-1, 301-9100-2, and 301.9100-3 provide the standards used to determine whether or not an extension of time to make a regulatory election will be granted. Treas. Reg. § 301.9100-1(b) defines “statutory election” as an election whose due date is prescribed by statute. Alternatively “regulatory election” means “an election whose due date is prescribed by a regulation published in the Federal Register, or a revenue ruling, revenue procedure, notice or announcement published in the Internal Revenue Bulletin. Treas. Reg. section 301.9100-1(b). In this case, the time for making the section 172(b)(3) election is stated in the statute, making it a statutory election.

Section 301.9100-2(b) grants an automatic six month extension of time to make a statutory or regulatory election if the due date of the election is the due date of the return or the due date of the return including extensions, provided the taxpayer timely filed its return for the year the election should have been made and the taxpayer takes corrective action within that 6-month period. Thus, under this regulation, if a taxpayer timely filed its return for the year, then the taxpayer can make the election late, but the election must be made no later than the extended due date of the return.

Alternatively, section 301.9100-3 provides extensions of time for making regulatory elections that do not meet the requirements of section 301.9100-2. Under this regulation, a taxpayer requests relief to make a late regulatory election by means of a private letter ruling. Unfortunately, this relief is not available for statutory elections such as a section 172(b)(3) election. Accordingly, the IRS does not consider requests for a private letter ruling to make a late section 172(b)(3) election because, as stated above, the IRS has no authority to allow the taxpayer to make a section 172(b)(3) election filed more than 6 months after the due date of the tax return, excluding extensions. Again, even if the taxpayer is precluded from making this election, the taxpayer is not precluded from carrying the NOL back on a timely filed amended return. We have coordinated this response with the subject matter experts, and they agree with the analysis. Please let me know if you have any further questions.

Best Regards,