Internal Revenue Service

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Department of the Treasury
Washington, DC 20224

Third Party Communication: None
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Person To Contact:
, ID No.
Telephone Number:

Refer Reply To:
CC:FIP:B03
PLR-120645-22

Date:
April 25, 2023

LEGEND:

Taxpayer =

Tax Advisor =

Year 1 =

Year 2 =

Year 3 =

Date 1 =

Date 2 =

Date 3 =

Date 4 =

Date 5 =

Date 6 =

Date 7 =

Date 8 =

Date 9 =

Date 10 =

Month 1 =

a =

b =

c =

d =

e =

f =

g =

h =

j =

k =

Dear :

This letter responds to a request for a private letter ruling Taxpayer filed with the Internal Revenue Service ("the Service") on Date 10. Taxpayer's letter requested an extension of time under § 301.9100 of the Procedure and Administration Regulations ("the Regulations") to make an election under § 475(f)(1) of the Internal Revenue Code ("the Code") to use the mark-to-market method of accounting, effective for the taxable year that ended Date 5.

FACTS

Taxpayer is an individual whose work experience has varied. Taxpayer's regular and recurring income consists solely of investment income. Taxpayer represents that it also has engaged in securities trading. The income Taxpayer made in Year 2 included a of tax-exempt interest, b of taxable interest, and c of dividends, of which d were

qualified dividends. For Year 2, Taxpayer reported no salaries, wages, tips, etc. or other business income on the Form 1040, *U.S. Individual Income Tax Return*.

During Year 2, Taxpayer realized approximately e of capital losses from securities trading activity. The vast majority of the losses were realized after Date 1, the due date for making a mark-to-market election under § 475(f)(1) for Year 2. Further, Taxpayer represents that in Date 2, after the due date for making a mark-to-market election under § 475(f)(1) for Year 2, Taxpayer started to employ a strategy for trading in certain securities. Taxpayer's strategy worked well until Date 3 or Date 4, at which point Taxpayer began to incur capital losses. Taxpayer continued to trade and incur capital losses in those securities through Date 5, and into Date 6. Taxpayer's acquisitions of the securities within the wash sale period described in § 1091(a) triggered the wash sale rules, which disallowed the capital losses incurred by Taxpayer during Month 1 of Year 2. The application of the wash sale rules caused the disallowed capital losses incurred during Year 2 to not be applied to offset the aggregate capital gains incurred in Year 2. Accordingly, Taxpayer reported on Taxpayer's Year 2 federal income tax return a capital gain of f.[1]

Taxpayer indicates that Taxpayer discovered the wash sale issue when Taxpayer visited the website of Taxpayer's brokerage firm on or about Date 7 and saw the wash sale loss posted in Taxpayer's brokerage firm account. Taxpayer temporarily ceased securities trading activities on or about Date 7. During Date 8, Taxpayer received a Form 1099 from Taxpayer's brokerage firm for Year 2 detailing and confirming the large amount of capital gains realized during that year as well as the substantial amount of capital losses disallowed for that year because of the application of the wash sale rules.

Upon receipt of the Year 2 Form 1099, Taxpayer contacted Tax Advisor, a certified public accountant and Taxpayer's regular tax advisor for the previous several years. Taxpayer's customary practice regarding the filing of federal income tax returns was to forward to Tax Advisor all the information for each taxable year, including the Forms 1099 related to Taxpayer's securities trading. Tax Advisor would then prepare the necessary returns. Taxpayer claims that during the email exchange with Tax Advisor following Taxpayer's receipt of the Year 2 Form 1099, Taxpayer learned for the first time of the possibility of making an election under § 475(f)(1) to use the mark-to-market method of accounting. Accordingly, Taxpayer indicates that Taxpayer was not aware that Taxpayer's trading activity during Year 2 might have enabled Taxpayer to claim that Taxpayer was a trader eligible to make an election under § 475(f)(1) effective for Year 2.[2]

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[1] Taxpayer represents that the wash sale disallowance from Taxpayer's trading activity was g, and the net capital gain from Taxpayer's trading activity, taking into account the wash sale disallowance, was h.

[2] Based on the information supplied by Taxpayer, whether Taxpayer's trading activity during Year 2 was sufficiently regular, frequent, and continuous for Taxpayer to have been considered engaged in the trade or business of being a trader in securities for purposes of § 475(f)(1) may be an issue.

Taxpayer states that although Tax Advisor knew of the extent and nature of Taxpayer's securities trading activities, Tax Advisor nevertheless failed to mention to Taxpayer the possibility of Taxpayer making a timely § 475(f)(1) election for Year 2. Consequently, Taxpayer asserts that Tax Advisor, being aware of Taxpayer's tax situation and securities trading activities, failed to advise Taxpayer properly and adequately regarding the federal income tax treatment of Taxpayer's securities trading activities. In Tax Advisor's affidavit, however, Tax Advisor states that Tax Advisor was familiar with the provisions of § 475, including making an election under § 475(f)(1) to use the mark-to-market method of accounting, but did not discuss the possibility with Taxpayer of Taxpayer making an election under § 475(f)(1) because Tax Advisor "did not think [Taxpayer] qualified for said election."

To make a timely § 475(f)(1) election for Year 2, Taxpayer had to make the § 475(f)(1) election by Date 1, the unextended due date of Taxpayer's federal income tax return for Year 1. A significant portion of Taxpayer's securities trading activities during Year 2 occurred after Date 1. Indeed, Taxpayer's brokerage firm statement for the last month of Year 2 indicates that Taxpayer traded shares in the securities referred to above more than j times during that period.

Accordingly, Taxpayer continued to engage in securities trading after Date 1 and claims that Taxpayer became aware of the existence of a § 475(f)(1) election during Date 8. At some point during Year 3, after learning of the availability of a § 475(f)(1) election and the consequences of Taxpayer's wash sales in Year 2, Taxpayer realized that it would have been beneficial for Taxpayer to have made a § 475(f)(1) election with a Year 2 effective date. Taxpayer represents that as a "protective" measure, Taxpayer made a timely § 475(f)(1) election for Year 3 no later than Date 9, the due date for the timely filing of Taxpayer's Year 2 federal income tax return. Taxpayer, however, did not file a request for an extension of time under § 301.9100-3 to make a late § 475(f)(1) election effective for Year 2 until Date 10.

LAW AND ANALYSIS

Taxpayer is not entitled to relief under § 301.9100 to make a late § 475(f)(1) election because Taxpayer did not act reasonably and in good faith, and granting relief would prejudice the interests of the Government.

Relief under § 301.9100 to make a late § 475(f)(1) election is denied

Section 475(f)(1) provides that a taxpayer engaged in a trade or business as a trader in securities may elect to apply the mark-to-market method of accounting to securities held in connection with such trade or business. Section 7805(d) provides that, except to the extent otherwise provided by the Code, any election shall be made at such time and in such manner as the Secretary shall prescribe.

Rev. Proc. 99-17, 1999-1 C.B. 503, sets forth the exclusive procedures for a taxpayer who is a trader in securities to make an election under § 475(f) to apply the mark-to-market method of accounting. Under section 5.03 of that revenue procedure, a taxpayer must file an election statement not later than the due date (without regard to any extension) of the original federal income tax return for the taxable year immediately preceding the election year and must attach the statement either to that return or, if applicable, to a request for an extension of time to file that return. Section 5.04 of Rev. Proc. 99-17 sets forth the requirements for the statement. The statement must describe the election being made, the first taxable year for which the election is effective, and, in the case of an election under § 475(f), the trade or business for which the election is made. Section 4 of Rev. Proc. 99-17 provides that an election under § 475(f) determines the method of accounting that an electing taxpayer is required to use for federal income tax purposes for securities subject to the election. Once a valid election is made, the taxpayer is required to use a mark-to-market method of accounting under § 475. Section 4 of Rev. Proc. 99-17 also provides that if a taxpayer fails to change the taxpayer's method of accounting to comply with the election, then the taxpayer is on an impermissible method.

Section 6.01 of Rev. Proc. 99-17[3] provides that a change in a taxpayer's method of accounting is a change in method of accounting to which the provisions of §§ 446 and 481 and the Income Tax Regulations promulgated thereunder apply. Section 6.03 of Rev. Proc. 99-17 generally provides that if a taxpayer changes its method of accounting under section 6.01 of Rev. Proc. 99-17, the taxpayer must take into account the net amount of the § 481(a) adjustment over the applicable period.

Rev. Proc. 2015-13, 2015-5 I.R.B. 419, sets forth the general procedures under § 446(e) to obtain the consent of the Commissioner to change a method of accounting for federal income tax purposes, including the procedures to obtain the automatic consent of the Commissioner to change a method of accounting listed in Rev. Proc. 2019-43, 2019-48 I.R.B. 1107. Section 24.01 of Rev. Proc. 2019-43 includes in the List of Automatic Changes to which the automatic change procedures in Rev. Proc. 2015-13 apply a request for a trader in securities that has made a § 475(f)(1) election to change the trader's method of accounting for securities to use the mark-to-market method of accounting under § 475.[4] Section 24.01(4) of Rev. Proc. 2019-43 refers to section 5 of Rev. Proc. 99-17 for the requirements to make a § 475(f)(1) election.

Under section 7.02 of Rev. Proc. 2015-13, unless otherwise provided in a specific change listed in Rev. Proc. 2019-43, a taxpayer making a change in method of accounting must apply § 481(a) and take into account the § 481(a) adjustment in the manner provided in section 7.03 of Rev. Proc. 2015-13. Section 24.01 of Rev. Proc. 2019-43 does not contain an exception to the rule in section 7.02 of Rev. Proc. 2015-13.

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[3] Section 6 of Rev. Proc. 99-17 was superseded by Rev. Proc. 99-49, 1999-2 C.B. 725.

[4] Rev. Proc. 2019-43 is the automatic method change revenue procedure that applied to the year that Taxpayer's election would have been effective, had it been timely filed.

Accordingly, the change in method of accounting as a result of a § 475(f)(1) election to use the mark-to-market method of accounting is made with a § 481(a) adjustment.

Section 301.9100-1(c) provides, in part, that the Commissioner has discretion to grant a reasonable extension of time to make a regulatory election (defined in § 301.9100-1(b) as an election whose due date is prescribed by regulations published in the Federal Register, or by a revenue ruling, revenue procedure, notice, or announcement published in the Internal Revenue Bulletin). Section 301.9100-1(b) defines the term election to include a request to change an accounting method.

Section 301.9100-3 sets forth rules that the Commissioner must use to determine whether the Commissioner will grant an extension of time for regulatory elections that do not meet the requirements of § 301.9100-2 for an automatic extension. Generally, a taxpayer must provide sufficient evidence to establish to the satisfaction of the Commissioner that the taxpayer acted reasonably and in good faith, and that the grant of relief will not prejudice the interests of the Government.

Except as provided in § 301.9100-3(b)(3), § 301.9100-3(b)(1) provides rules for determining when a taxpayer is deemed to have acted reasonably and in good faith. Section 301.9100-3(b)(1)(i) provides that a taxpayer will be deemed to have acted reasonably and in good faith if the taxpayer requests relief under § 301.9100-3 before the failure to make the regulatory election is discovered by the Service. Section 301.9100-3(b)(3) provides rules as to when a taxpayer is deemed to have not acted reasonably and in good faith. Section 301.9100-3(b)(3)(iii) provides that a taxpayer is deemed to have not acted reasonably and in good faith if specific facts have changed since the due date for making the election that make the election advantageous to a taxpayer. In such a case, the Service will grant relief only when the taxpayer provides strong proof that the taxpayer's decision to seek relief did not involve hindsight.

Section 301.9100-3(c) provides that the Commissioner will grant a reasonable extension of time to make a regulatory election only when the interests of the Government will not be prejudiced by the granting of relief. Section 301.9100-3(c)(1)(i) provides that the interests of the Government are prejudiced if granting relief would result in a 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)(2) provides special rules for accounting method regulatory elections. Section 301.9100-3(c)(2)(ii) provides that the interests of the Government are deemed to be prejudiced except in unusual and compelling circumstances if the accounting method regulatory election for which relief is requested requires an adjustment under § 481(a) (or would require an adjustment under § 481(a) if the taxpayer changed to the method of accounting for which relief is requested in a taxable year subsequent to the taxable year the election should have been made).

(a) Taxpayer did not act reasonably and in good faith

Section 301.9100-3(b)(3)(iii) provides that a taxpayer is deemed to have not acted reasonably and in good faith if specific facts have changed since the due date for making the election that make the election advantageous to a taxpayer. In such a case, the Service will grant relief only when the taxpayer provides strong proof that the taxpayer's decision to seek relief did not involve hindsight.

To make a timely § 475(f)(1) election for the taxable year that ended Date 5, Taxpayer would have had to make the election by Date 1, the unextended due date of Taxpayer's Year 1 federal income tax return. Taxpayer's request for a late filing of the § 475(f)(1) election was not made until Date 10. This late filing provided Taxpayer the benefit of over k months of hindsight to review and consider the results of Taxpayer's securities trading transactions and to determine whether Taxpayer would have benefited by making the election. If Taxpayer had made a timely § 475(f) election, Taxpayer would not have had the benefit of knowing the results of Taxpayer's securities transactions after the election's due date, and Taxpayer would not have had this time to act on that knowledge.

Accordingly, Taxpayer gained a benefit from hindsight because Taxpayer was able to determine the effect of making a § 475(f)(1) election beginning with Year 2, armed with the benefit of knowing the results of Taxpayer's securities trading activities for over k months following the due date for making the election. Moreover, Taxpayer did not provide strong proof showing that Taxpayer's decision to seek relief to make a late election did not involve hindsight.[5] Accordingly, under § 301.9100-3(b)(3), Taxpayer is deemed to have not acted reasonably and in good faith.

(b) Granting Relief Would Prejudice the Interests of the Government

Under § 301.9100-3(c)(2)(ii), the interests of the Government are deemed to be prejudiced, except in unusual and compelling circumstances, if the accounting method regulatory election for which relief is requested requires an adjustment under § 481(a) (or would require an adjustment under § 481(a) if the taxpayer changed to the method of accounting for which relief is requested in a taxable year subsequent to the taxable year the election should have been made). Taxpayer has not presented unusual and compelling circumstances for Taxpayer's failure to timely make a § 475(f)(1) election.

Since a § 475(f)(1) election is an accounting method regulatory election that requires a § 481(a) adjustment, the interests of the Government are deemed to be prejudiced because Taxpayer has failed to present unusual and compelling circumstances to justify granting the requested relief.

[5] Taxpayer did not offer factual proof on this point. Rather, Taxpayer only argued that Taxpayer would have timely made the election even without knowledge of the factual developments that made the election advantageous.

CONCLUSION

Based on the facts and representations submitted, we conclude that Taxpayer has not satisfied the requirements to justify granting an extension of time under § 301.9100-3 to make an election under § 475(f)(1) to use the mark-to-market method of accounting, effective for the taxable year that ended Date 5. Specifically, Taxpayer has failed to demonstrate that Taxpayer acted reasonably and in good faith, and that granting relief will not prejudice the interests of the Government. Accordingly, Taxpayer's request for an extension of time to make an election under § 475(f)(1) to use the mark-to-market method of accounting for the taxable year that ended Date 5 is denied.

Except as expressly provided herein, no opinion is expressed or implied concerning the federal income tax consequences of the transactions described above. In particular, no opinion is expressed or implied as to whether Taxpayer's securities trading activities constitute those of a trader in securities eligible to make the election under § 475(f)(1) to use the mark-to-market method of accounting.

This ruling is directed only to the taxpayer that requested it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.

In accordance with the terms of a power of attorney on file in this office, a copy of this letter is being sent to your authorized representatives.

Sincerely,

_____

Jason D. Kristall
Branch Chief, Branch 3
Office of the Associate Chief Counsel
(Financial Institutions & Products)

Enclosures:

Copy of this letter
Copy for section 6110 purposes

cc: