Internal Revenue Service

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Department of the Treasury
Washington, DC 20224

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Date of Communication: Not Applicable

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PLR-109300-23

Date:
October 19, 2023

LEGEND:

Taxpayer =

Year 1 =

Year 2 =

Year 3 =

Date 1 =

Date 2 =

Date 3 =

Date 4 =

Date 5 =

a =

Dear :

This letter responds to a request for a private letter ruling that Taxpayer filed with the Internal Revenue Service (the "Service") on Date 1. Taxpayer's letter requested an extension of time under § 301.9100-3 of the Procedure and Administration 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, beginning with the taxable year that ended Date 2.

FACTS

Taxpayer represents that Taxpayer engages in securities trading. For the Year 1 taxable year, Taxpayer reported Form W-2 salary and wage income, dividend income, interest income, capital losses, and other income on Taxpayer's Form 1040, *U.S. Individual Income Tax Return*.

Taxpayer represents that during Date 3, Taxpayer began to actively trade securities in a revocable trust account, making hundreds of securities trades on a typical trading day. While Taxpayer had engaged in some securities trading activity prior to the Year 1 taxable year, Taxpayer represents that because active securities trading in this manner was a new activity for Taxpayer, Taxpayer was unaware of the possibility of electing to use the mark-to-market method of accounting under § 475(f)(1) for an eligible trader in securities.

Taxpayer's acquisitions of certain securities within the wash sale period described in § 1091(a) triggered the wash sale rules, which disallowed certain capital losses incurred by Taxpayer during Year 1. The application of the wash sale rules during Year 1 caused the disallowed capital losses incurred during Year 1 to not be applied to offset the aggregate capital gains incurred in Year 1.

At some point during the Year 2 taxable year, after learning of the possibility of making a § 475(f)(1) election and the income tax consequences of Taxpayer's Year 1 wash sales, Taxpayer realized that it would have been beneficial for Taxpayer to have made a § 475(f)(1) election with an effective date of the Year 1 taxable year.

To make a timely § 475(f)(1) election for the Year 1 taxable year, Taxpayer had to make the § 475(f)(1) election by Date 4, the unextended due date of Taxpayer's federal income tax return for the Year 3 taxable year. Taxpayer, however, did not file a request for relief under § 301.9100-3 to make a late § 475(f)(1) election effective for the Year 1 taxable year until Date 5.

LAW AND ANALYSIS

Taxpayer is not entitled to relief under § 301.9100-3 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 § 301.9100-3 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.

When § 475(f) was enacted, Congress expressed its understanding that mark-to-market elections "will be made in the time and manner prescribed by the Secretary." H.R. Rep. No. 105-148 at 446 (1997). The Commissioner prescribed the time and manner for making these elections in Rev. Proc. 99-17, 1999-1 C.B. 503. Rev. Proc. 99-17 sets forth the exclusive procedures for a taxpayer who is a trader in securities to make an election under § 475(f)(1) 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. For a trader in securities, the statement must describe the election being made, the first taxable year for which the election is effective, and the trade or business for which the election is made. Section 4 of Rev. Proc. 99-17 provides that an election under § 475(f)(1) 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 a taxpayer is on an impermissible method of accounting if the taxpayer fails to change the taxpayer's method of accounting to comply with the election.

A change to the mark-to-market method of accounting under § 475 is a change in method of accounting to which the provisions of §§ 446 and 481, and the Income Tax Regulations promulgated thereunder, apply. Rev. Proc. 2015-13, 2015-5 I.R.B. 419, as clarified and modified by Rev. Proc. 2015-33, 2015-24 I.R.B. 1067, and as modified by Rev. Proc. 2021-34, 2021-35 I.R.B. 337, Rev. Proc. 2021-26, 2021-22 I.R.B. 1163, Rev. Proc. 2017-59, 2017-48 I.R.B. 543, and section 17.02(b) and (c) of Rev. Proc. 2016-1, 2016-1 I.R.B. 1., 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. 2022-14, 2022-7

I.R.B. 502. Section 24.01 of Rev. Proc. 2022-14 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.[1] Section 24.01(4) of Rev. Proc. 2022-14 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. Accordingly, the change in method of accounting made 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. Section 301.9100-2 applies only to certain regulatory elections, and an election under § 475(f)(1) does 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

[1] Rev. Proc. 2022-14 is the automatic method change revenue procedure that would have applied to Taxpayer's election had the election been timely filed.

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 Year 1 taxable year, Taxpayer would have had to make the election by Date 4, the unextended due date of Taxpayer's Year 3 federal income tax return. Taxpayer's request for a late filing of a § 475(f)(1) election was not made until Date 5. This late filing provided Taxpayer the benefit of over a 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)(1) 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 the first day of the Year 1 taxable year, fully knowing the results of Taxpayer's securities trading activities for over a 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.[2] 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.

Because 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.

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 Year 1 taxable year. 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 beginning in the taxable year that ended Date 2, 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.

[2] Taxpayer did not offer factual proof on this point. Rather, Taxpayer only argued that Taxpayer would have made a timely § 475(f)(1) election, even without knowledge of the factual developments that made the election advantageous.

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

Sincerely,

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Jonathan A. LaPlante
Senior Technician Reviewer, Branch 3
Office of the Associate Chief Counsel
(Financial Institutions & Products)

Enclosures:

Copy of this letter
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cc: