

Office of Chief Counsel
Internal Revenue Service

memorandum

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date: **OCT 5 2001**

to: PSP Support Section Manager, Phoenix
Shirley Gamble

from: Area Counsel
(Small Business/Self-Employed: Area 5)

subject: Election under I.R.C. Section 183(e)

DISCLOSURE STATEMENT

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse effect on privileges, such as the attorney client privilege. If disclosure becomes necessary, please contact this office for our views.

This memorandum responds to your request for assistance dated April 19, 2001. This memorandum should not be cited as precedent.

FACTS

None provided. Counsel was asked to review advice given by Counsel in 1994 and requested to give a general update on the facets of the applicability of I.R.C. § 183 to S corporations and partnerships. This memorandum does not address fact-specific issues discussed in Counsel's advice given in 1994 which was specific to a pending case at the time.

ISSUES

1) How far is the statute of limitations on assessments extended by a § 183(e) election?

2) Do separate consent to extend the statute of limitations forms have to be filed with Form 5213 for the limitations period to be properly extended?

3) If filing the Form 5213 does result in consent to extend the statute of limitations, does it also result in the automatic consent of all the shareholders of an S corporation and all the partners of a partnership?

4) When does the spouse of an S corporation shareholder or the spouse of a partner of a partnership have to sign the Form 5213?

CONCLUSIONS

1) The statute of limitations on assessment is extended by two years by an I.R.C. § 183(e) election.

2) An individual taxpayer, engaged in an activity to which I.R.C. § 183 applies, must file Form 5213 to secure both the election and the extension of the limitations period.

3) Where the taxpayer is an S corporation, the shareholders are bound by the election made by the S corporation. Furthermore, if the taxpayer is a TEFRA partnership, the partners are bound by the election made by the tax matters partner for the partnership, if the tax matters partner extends the statute of limitations. Otherwise, each partner can only bind itself by its I.R.C. § 183(e) election, and the partnership must also execute an election under I.R.C. § 183(e).

4) Where each partner must sign the Form 5213 in an individual capacity, then that partner's spouse must also sign the Form 5213. Spouses of shareholders need not sign the Forms 5213, as the shareholders are bound by the election of the S corporation.

ANALYSIS

1. Length of Extension of Limitations Period

Prior to 1976, the extension of the limitations period under I.R.C. § 183 was 18 months under Treas. Reg. § 12.9(d)(2) because I.R.C. § 183 did not specify the length of the extension period. In 1976 Congress enacted I.R.C. § 183(e)(4) which supplants the 18 month period specified by the regulation by extending the limitations period two years following the due date of the last return. This change is reflected on Form 5213.

2. Automatic Consent Under § 183(e)(4)

I.R.C. § 183(e)(4) states "if a taxpayer makes an election under paragraph (1) with respect to an activity, the statutory period for the assessment of any deficiency attributable to such

activity shall not expire before the expiration of 2 years after the date prescribed by law ... for filing the return of tax ... for the last taxable year in the period of 5 taxable years." This language would appear to make the extension automatic upon the filing of the election. The instructions to Form 5213 reflect this approach, stating that "generally, filing this form automatically extends the period of limitations for assessing your income tax deficiency specifically attributable to the activity during any year in the presumption period." Form 5213 was last revised in July, 2000 and reflects the current version of the statute by stating in the instructions that the election constitutes a consent to extend the statute.¹

The case law and treatises also confirm that the consent process is automatic upon filing of Form 5213. In Crawford v. Commissioner, 97 T.C. 302 (1991), the court stated that § 183(e)(4) automatically extends the limitations period when an election is filed. The court ultimately held that § 183(e)(4) modifies § 6501(a), extending the period to assess tax, when Form 5213 is filed. Pruitt v. Commissioner, T.C. Memo. 1991-398, aff'd, 1993 U.S. App. Lexis 33069 (4th Cir. 1993), reached the same conclusion. Eustice and Kuntz have also noted that I.R.C. § 183(e)(4) supersedes the regulation by providing for an automatic extension of the limitations period. J. Eustice & J. Kuntz, Federal Income Taxation of S Corporations ¶ 16.02[2] (3rd ed. 1985). Accordingly, we believe that the filing of Form 5213, if signed by the proper parties, extends the limitations period.

3. Consent of Shareholders and Partners

a. Consent of Shareholders of an Electing S Corporation

The instructions for Form 5213 state, "An election made by a partnership or an S-corporation is binding on all persons who were partners or shareholders at any time during the presumption period." To that end, the signature block on the Form provides for the signature and title of the S corporation officer.²

I.R.C. § 1363(c)(1) provides that except as provided in I.R.C. § 1363(c)(2) (relating to elections under I.R.C. §§ 617 and 901), any election affecting the computation of items derived

¹ Temp. Treas. Reg. § 12.9(d)(2) consent requirements are not current with the automatic consent provision of I.R.C. § 183(e)(4) and should, therefore, be disregarded for this process.

² As stated above, Form 5213 was revised in July, 2000.

from an S corporation shall be made by the corporation. I.R.C. § 1363(c)(1) applies to the election under I.R.C. § 183(e)(1), because the election affects the computation of the S corporation's tax items. The election is binding on both the S corporation and all of its shareholders. This is because an effective election under I.R.C. § 183(e)(1) invokes the application of I.R.C. § 183(e)(4). I.R.C. § 183(e)(4) automatically extends the period for the assessment of any deficiency attributable to the 183 activity, whether against the corporation or its shareholders.

Under the foregoing law, we conclude that an S corporation's election under I.R.C. § 183(e)(1) automatically extends the statutory period for assessment against all of its shareholders as well as against the corporation, whether or not the shareholders consent.³

b. Consent of Partners of an Election Partnership

Section 183 applies to partners and partnerships at the partnership level. Tallal v. Commissioner, 778 F.2d 275 (5th Cir. 1985); I.R.C. § 6221; Rev. Rul. 77-320, 1977-2 C.B. 78. Form 5213 provides for the signature of the general partner authorized to sign the partnership return. Furthermore, the instructions to the form state that an election made by the partnership is binding on all partners at any time during the presumption period.

I.R.C. § 6229(b)(1)(B) states that the statute of limitations for making assessments on a partnership item can be extended with respect to all of the partners by the tax matters partner or any other person authorized by the partnership in writing to extend the statute of limitations. Because of uncertainty as to whether the election must be made by the partnership under I.R.C. § 703(b) or individually by the partners, a statute extension should also be secured from the tax matters partner on Form 872-P. This will avoid any potential litigating hazards.⁴ Should the tax matters partner refuse to sign a consent to extend the statute of limitations under I.R.C. § 6229(b)(1)(B), then each partner should be requested to make

³ See also 1997 FSA LEXIS 383.

⁴ Temp. Treas. Reg. § 12.9(b) indicates that each partner need make the election for himself, as discussed above, this regulation was promulgated in 1974. I.R.C. § 6229(b)(1)(B) was enacted in 1982 and controls where it conflicts with the older Treasury Regulation.

the election under I.R.C. § 183 individually. Furthermore, an election under I.R.C. § 183 from the partnership should also be secured.

However, unlike the situation of S corporations and TEFRA partnerships for which the statute of limitations is extended under I.R.C. § 6229(b)(1)(B), Counsel could not find any other authority for a partner to bind the other partners with an I.R.C. § 183(e) election absent an agreement under I.R.C. § 6229(b)(1)(B). Thus, each partner must make its own election, and one partner can not extend the statute of limitations with respect to the other partners in the partnership. Also, an election under I.R.C. § 183 for the partnership must be secured.

4. Consent of Spouses

Temp. Treas. Reg. §§ 12.9(d)(2)(ii) and (iii), require not only the consent of each shareholder but their spouses as well. However, as discussed above, each shareholder's signature on the Form 5213 is not necessary. Therefore, each shareholder's spouse's signature is not necessary as well. This conclusion is consistent with the current version of Form 5213.

Furthermore, where a partner has authority to bind the partnership and the other partners, the signature of the spouses of the bound partners is not necessary.

However, where there is no partner with the authority to bind the partnership and each partner can only bind themselves (and thus would be signing the Form 5213 in an individual capacity), the spouses of such partners must also sign the Form 5213. The instructions for Form 5213 state, "[i]f you and your spouse filed a joint return, both of you must elect to postpone the determination even if only one of you is engaged in the activity." These instructions should be followed.

a. Effect of S Corporation Attribution Rules

I.R.C. § 1361(c)(1) states that "for the purposes of subsection (b)(1)(A), a husband and wife (and their estates) shall be treated as one shareholder." This section of the Code does not aid in determining whether a nonshareholder spouse must consent to an extension of the limitations period because it is limited in application to I.R.C. § 1361(b)(1)(A). This subsection has the sole purpose of allowing a corporation to qualify for Subchapter S status by meeting the 75 shareholder limit imposed by I.R.C. § 1361(b)(1)(A).

Should any fact-specific questions arise regarding elections under I.R.C. § 183, please send them to our office for further consideration. If you have any questions, please call Attorney Erin Huss at (602) 207-8051.

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By: _____
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