

INTERNAL REVENUE SERVICE

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April 3, 2002

Employer =

Dear

This is in response to your letter of October 17, 2001 in which you asked for consent to revoke an election you made under section 83(b) of the Internal Revenue Code.

You have represented that, on September 17, 2001, you exercised certain stock options granted to you by Employer. The stock you received on exercise of the options was subject to a substantial risk of forfeiture that the property reverts to Employer if for any reason your employment is terminated. On October 8, 2001, you filed an election under section 83(b) with the Internal Revenue Service Center in Fresno with respect to the stock you received. On October 17, 2001, you sent a letter to this office asking for consent to revoke your section 83(b) election. The reason you give for wanting to revoke the election is that you mistakenly believed that the election would operate to postpone the inclusion of the value of the stock in your gross income.

Section 83 of the Code contains the rules for transfers of property in connection with the performance of services. Section 83(a) provides that the excess of the fair market value of the property transferred, at the time the property becomes substantially vested, over the amount paid for the property shall be included as compensation in the gross income of the person who performed the services in the taxable year in which the property becomes substantially vested. Property is substantially vested when it is either transferable or not subject to a substantial risk of forfeiture. Under section 83(c)(1) of the Code, the rights of a person in property are subject to a substantial risk of forfeiture if such person's rights to full enjoyment of the property are conditioned upon the future performance of substantial services by any individual.

Section 83(b)(1) of the Code provides that the person in connection with whose services the property is transferred may elect to include in gross income for the taxable year of transfer the excess of the fair market value of the property over the amount paid for it. Section 83(b)(2) states that an election under section 83(b)(1) shall be made not later than 30 days after the date of transfer of the property and may not be revoked without the consent of the Secretary.

Section 1.83-2(f) of the Income Tax Regulations provides that consent to revoke an election under section 83(b) will be granted only in a case where the transferee is under a mistake of fact as to the underlying transaction and must be requested within 60 days of the date on which the mistake of fact first became known to the person who made the election.

In National Lead Company v. Commissioner, 336 F.2d 134 (2d Cir. 1964), the taxpayer made an election for the taxable year 1950 to use the Last-In, First-Out (LIFO) inventory replacement provisions of section 22(d)(6)(F) of the Internal Revenue Code of 1939. Section 22(d)(6)(D) of the Code of 1939 generally provided that an election to use the LIFO method, once made, shall be irrevocable. Regulation 111, 1952-2 C.B. 76, provided that a taxpayer could elect to have section 22(d)(6)(F) apply for certain years ending after June 30, 1950 and before March 1, 1952 and that such election could be made at any time up to December 15, 1952. On March 4, 1952, the taxpayer notified the Commissioner that it was revoking its election. The reason for the revocation was a change in market conditions under which the taxpayer would benefit by revoking its election. The court, citing Haggar v. United States, 308 U.S. 389 (1940), as authority for the proposition that an election can be validly revoked within the time allowed for making it, held that the taxpayer properly revoked its election, even though the statute provided that the election, once made, was irrevocable. The court reasoned that the government is in no way disadvantaged by such a result since the final election was made within the time specified by law.

Similarly, in Matheson v. Commissioner, 74 T.C. 836 (1980), acq. in result, 1981-1 C.B. 2, the taxpayers made an election under section 165(h) of the Code (redesignated as section 165(i) by section 203(g) of Pub. L. No. 97-248, 1982-2 C.B. 471) to treat a disaster loss as if it had occurred in the taxable year prior to the year in which it actually occurred. Section 1.165-11(e) of the regulations provides that the election is made by filing a return, an amended return, or a claim for refund, clearly showing that the election provided for by section 165(h) has been made. Section 1.165-11(e) further provides that such election shall be irrevocable after the later of (1) 90 days after the date on which the election was made, or (2) March 6, 1973. In Matheson, the taxpayers attempted to revoke their section 165(h) election on January 31, 1977, 95 days after they had made the election. The court held that the taxpayers could validly revoke their section 165(h) election notwithstanding that the time limit for revoking the election provided by the regulations had passed. The court further held that the part of the regulations which imposes a time limit for revocation which is shorter than the time limit for making the election was invalid because the regulations improperly cut back the benefits authorized to the taxpayers by statute.

The Service has previously recognized the principle that an election made under the Code or regulations may be revoked before the due date for making the election. Rev. Rul. 56-67, 1956-1 C.B. 437, dist. by Rev. Rul. 76-393, 1976-2 C.B. 255, involved the question of whether an affiliated group of corporations, having properly made an election to file a consolidated return, may, on or before the due date of such return, file their returns on a separate basis. Rev. Rul. 56-67 held that, notwithstanding that an election to file a consolidated return had been properly made, the members of an affiliated group could

validly revoke that election by filing returns on a separate basis, on or before the due date of such returns, and that a consolidated return may properly be filed on or before the due date of a consolidated return, notwithstanding the earlier filing of separate returns. See Rev. Rul. 78-295, 1978-2 C.B. 165.

In the instant case, you filed your request to revoke your section 83(b) election within the 30 day time period allowed under section 83(b) of the Code for making the election. Accordingly, we conclude that consent to revoke your section 83(b) election will be granted.

This ruling is directed only to the taxpayer who requested it. Section 6110(j)(3) of the Code provides that it may not be used or cited as precedent. A copy of this letter should be attached to your income tax return for 2001.

Sincerely yours,
ROBERT MISNER
Acting Chief, Executive Compensation
Branch
Office of the Division Counsel/Associate
Chief Counsel
(Tax Exempt and Government Entities)