

Internal Revenue Service

Department of the Treasury

Number: **200317003**
Release Date: 4/25/2003
Index No.: 9100.00-00

Washington, DC 20224

Person to Contact:

Telephone Number:

Refer Reply To:
CC:ITA:3 – PLR-145455-02
Date:
December 18, 2002

Re:
EIN:

LEGEND

Taxpayer

Law Firm

Year

First Paralegal

Second Paralegal

Associate

Dear _____ :

This is in reply to your private letter ruling request dated August 14, 2002, in which you request, on behalf of Taxpayer, an extension of time to make an election under § 311(e) of the Taxpayer Relief Act of 1997 (§ 311(e) election) for tax year 2001.

FACTS

Taxpayer is a trust that is treated as a partnership for Federal income tax purposes.
Taxpayer is a calendar year taxpayer.

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Taxpayer has three partners. Taxpayer and the partners engaged Law Firm to prepare their 2001 partnership and individual tax returns. Law Firm has prepared the partners' individual tax returns for over 35 years and has prepared Taxpayer's partnership tax returns since its inception in Year. Throughout this period of more than 35 years, Law Firm has never filed a tax return on behalf of Taxpayer or its partners later than the extended due date.

First Paralegal was employed by Law Firm and had prepared the partners' individual tax returns for the past 20 years. First Paralegal had prepared Taxpayers' partnership tax returns since its inception. In 2001, First Paralegal retired from Law Firm.

Associate and Second Paralegal are employed by Law Firm and were responsible for preparing the 2001 tax returns of Taxpayer and the partners. Associate has an LL.M. in Taxation and has a broad range of experience in partnership and individual tax matters. Associate works under the supervision of a partner in Law Firm who has been with Law Firm for more than 35 years. Second Paralegal has been a paralegal at Law Firm for 17 years and has prepared and filed tax returns throughout her 27-year professional career. Associate took primary responsibility for preparing Taxpayer's 2001 partnership tax return. Second Paralegal took primary responsibility for preparing the partners' 2001 individual tax returns.

In early 2002, Associate and other tax professionals at Law Firm advised Taxpayer of its option to make a § 311(e) election for certain capital assets. Taxpayer decided to make the § 311(e) election, which necessitated the appraisal of certain assets. Second Paralegal filed an extension for Taxpayer to file its 2001 partnership tax return until July 15, 2002. Second Paralegal filed an extension for the partners to file their 2001 individual tax returns until August 15, 2002.

Through the spring and summer of 2002, Law Firm was working with appraisers and others to value assets held by Taxpayer for purposes of making the § 311(e) election. Associate and others at Law Firm mistakenly assumed that Second Paralegal had extended the due date for Taxpayer's 2001 partnership tax return until August 15, 2001, the extended due date for the partners' 2001 individual tax returns. Consequently, Taxpayer's 2001 partnership tax return was not filed by July 15, 2002, the extended due date. Taxpayer filed its 2001 partnership tax return in August 2002 and included on it information about the § 311(e) election.

Taxpayer represents that (1) the late filing of its partnership tax return was the result of an honest mistake by Law Firm, (2) at all relevant times it intended to make the § 311(e) election, (3) it is not requesting an extension as a result of hindsight, (4) it provided Law Firm with all of the information necessary for the preparation of its 2001 partnership tax return, and (5) relief granted under § 301.9100-3 the Procedure and Administration Regulations will not result in Taxpayer having a lower tax that it would have had it made a timely election.

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LAW

Under § 1(h) of the Internal Revenue Code, gain resulting from the sale or exchange of most capital assets is taxed at a capital gains rate of 20 percent (10 percent for gain otherwise taxed at an ordinary rate of 15 percent or less). Section 1(h)(2)(B) provides that the 20-percent capital gains rate is reduced to 18 percent for qualified 5-year gain resulting from the sale or exchange of property with a holding period beginning after December 31, 2000. Qualified 5-year gain is defined generally by § 1(h)(9) as “the aggregate long-term capital gain from property held for more than 5 years.”

Section 311(e) of the Taxpayer Relief Act of 1997 (TRA97) allows a noncorporate taxpayer holding a capital asset on January 1, 2001, to elect to treat that asset as having been both sold and reacquired on that date (January 2, 2001, for readily tradable stock) for an amount equal to its fair market value. If a taxpayer makes a § 311(e) election, the holding period for the elected asset begins after December 31, 2000. This makes the asset eligible for an 18-percent rate capital gains rate if it is later sold after having been held by the taxpayer for more than 5 years from the date of the deemed sale and reacquisition.

A taxpayer makes a § 311(e) election by following the instructions for the appropriate Schedule D or Form 4797. Under these instructions, the taxpayer must report the resulting gain in gross income on the tax return for the tax year that includes the date of the deemed sale and attach a statement to the return stating that the election is being made under § 311(e) of TRA97 and listing the assets for which the election is being made. The tax return on which the gain is reported must be filed by its due date, including extensions.

Taxpayers who timely filed their tax returns without making the § 311(e) election for one or more eligible assets may still make the election by filing an amended return within 6 months of the due date of the original return, excluding extensions.

Under appropriate circumstances, the Internal Revenue Service will grant requests to make a late § 311(e) election under § 301.9100-1 through 301.9100-3 of the Procedure and Administration Regulations. Notice 2002-58, 2002-35 I.R.B. 432.

Section 301.9100-3(a) of the regulations provides that requests for extensions of time for regulatory elections that do not meet the requirements of § 301.9100-2 of the regulations will be granted when the taxpayer provides evidence (including affidavits) to establish that the taxpayer acted reasonably and in good faith, and that granting relief will not prejudice the interests of the Government.

Section 301.9100-3(b)(1) of the regulations states that a taxpayer will be deemed to have acted reasonably and in good faith if the taxpayer--

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- (i) requests relief before the failure to make the regulatory election is discovered by the Service;
- (ii) failed to make the election due to intervening events beyond the taxpayer's control;
- (iii) failed to make the election because, after exercising reasonable diligence, the taxpayer was unaware of the necessity for the election;
- (iv) reasonably relied on the written advice of the Service; or
- (v) reasonably relied on a qualified tax professional, and the tax professional failed to make, or advise the taxpayer to make, the election.

Section 301.9100-3(b)(2) of the regulations states that a taxpayer will not be considered to have reasonably relied on a qualified tax professional if the taxpayer knew or should have known that the professional was not (i) competent to render advice on the regulatory election, or (ii) aware of all relevant facts.

Section 301.9100-3(b)(3) of the regulations provides that a taxpayer is deemed to have not acted reasonably and in good faith if the taxpayer--

- (i) seeks to alter a tax return position for which an accuracy-related penalty has been or could be imposed under § 6662 at the time the taxpayer requests relief and the new position requires or permits a regulatory election for which relief is requested;
- (ii) was fully informed of the required election and related tax consequences, but chose not to file the election; or
- (iii) uses hindsight in requesting relief. If specific facts have changed since the due date for making the election that make the election advantageous to a taxpayer, the Service will not ordinarily grant relief.

Section 301.9100-3(c) of the regulations states that the Service will grant a reasonable extension of time only when the interests of the Government will not be prejudiced by the granting of relief. The interests of the Government will be prejudiced if (i) 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), and (ii) the taxable year in which the regulatory election should have been made or any taxable years that would have been affected by the election had it been timely made are closed by the period of limitations on assessment before the taxpayer's receipt of a ruling granting relief under this section.

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ANALYSIS

Taxpayer acted reasonably and in good faith with respect to making the § 311(e) election. Taxpayer reasonably relied on qualified tax professionals at Law Firm. The tax professionals engaged by Taxpayer advised it to make the § 311(e) election and were taking steps necessary to make the § 311(e) election, but due to an oversight, failed to ensure that Taxpayer made the § 311(e) election on a timely basis. Granting relief to Taxpayer to make a late § 311(e) election will not prejudice the interests of the Government. Granting relief would not result in Taxpayer having a lower tax liability in the aggregate for all taxable years affected by the election than Taxpayer would have had if the § 311(e) election had been timely made. The 2001 tax year, the taxable year in which the regulatory election should have been made, is not closed by the period of limitations on assessment.

Section 301.9100-3(b)(2) of the regulations does not apply in the instant case because Law Firm was competent to render advice on the regulatory election and Taxpayer informed Law Firm of all relevant facts. Section 301.9100-3(b)(3) of the regulations does not apply in the instant case because Taxpayer (i) is not seeking to alter a tax return position for which an accuracy-related penalty has been or could be imposed, (ii) did not chose not to file the § 311(e) election, and (iii) did not use hindsight in requesting relief.

CONCLUSION

Based solely on the facts as represented and the applicable law, we conclude that the request for relief under § 301.9100-3 of the regulations should be granted.

Accordingly, Taxpayer is granted an extension of time to make the § 311(e) election through the date Taxpayer filed its 2001 partnership tax return. Therefore, the § 311(e) election made on Taxpayer's late-filed return was timely made. A copy of this letter must be attached to any income tax return to which it is relevant and should be kept with Taxpayer's records.

The ruling contained in this letter is based on information and representations submitted by Taxpayer and accompanied by a penalty of perjury statement executed by the appropriate party.

While this office has not verified any of the material submitted or facts assumed in support of the ruling request, it is subject to verification on examination.

Except as expressly provided therein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter. This letter does not rule on whether Taxpayer is eligible to make a § 311(e)

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election or the validity of the § 311(e) election made on Taxpayer's late-filed 2001 partnership tax return.

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

Sincerely,

Christopher F. Kane
Branch Chief
Office of Associate Chief Counsel
(Income Tax & Accounting)

Enclosures:

Copy for § 6110 purposes