

Internal Revenue Service

Department of the Treasury
Washington, DC 20224

Number: **200719008**

Release Date: 5/11/2007

Index Number: 9100.00-00

Third Party Communication: None
Date of Communication: Not Applicable

Person To Contact:
, ID No.

Telephone Number:

Attention:

Refer Reply To:
CC:ITA:B01
PLR-145669-06
Date: February 5, 2007

LEGEND

- Taxpayer =
- Year 1 =
- Accountant =
- Law Firm =
- date a =

Dear :

This is in response to your letter dated September 14, 2006. You requested an extension of time on behalf of Taxpayer to make an election under § 163(d)(4)(B)(iii) of the Internal Revenue Code to take net capital gain from the disposition of property held for investment into account as investment income under §§ 163(d)(1) and 163(d)(4)(B) for Taxpayer's Year 1, taxable year. The request to make the late election is based on §§ 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations.

FACTS

Taxpayer is a trust that makes long-term investments in real property and is engaged in other business operations. Taxpayer had investment interest expense and net capital gain from dispositions of real property held for investment in Year 1. Taxpayer did not elect to include any part of its net capital gain in investment income on a Form 4952, *Investment Interest Expense Deduction*, for Year 1.

Taxpayer relied on Accountant, a certified public accountant with extensive experience in tax matters, to complete and timely file its Form 1041, *U.S. Income Tax Return for Estates and Trusts*, for Year 1. Taxpayer has employed Accountant for several years.

On date a, Law Firm was asked to review Taxpayer's Form 1041 for Year 1. Law Firm concluded that Taxpayer's failure to make a timely election under § 163(d)(4)(B)(iii) would not permit it to include any capital gain in the calculation of investment income under § 163(d)(4)(B) on its Year 1 return unless an extension of time to make the election was obtained pursuant to §§ 301.9100-1 and 301.9100-3.

LAW & ANALYSIS

Section 163(d)(1) provides that, in the case of a taxpayer other than a corporation, the amount allowed as a deduction for investment interest shall not exceed the net investment income of the taxpayer for the taxable year. Investment interest expense that is disallowed by § 163(d)(1) may be carried to the next taxable year. Section 163(d)(2).

Section 163(d)(4)(B) provides, in part, that investment income is the sum of —

(i) gross income from property held for investment (other than gain taken into account under clause (ii)(I)),

(ii) the excess (if any) of —

(I) the net gain attributable to the disposition of property held for investment, over

(II) the net capital gain determined by only taking into account gains and losses from dispositions of property held for investment, plus

(iii) so much of the net capital gain referred to in clause (ii)(I) as the taxpayer elects to take into account under this clause.

Section 1.163(d)-1(b) of the Income Tax Regulations provides that the election under § 163(d)(4)(B)(iii) must be made on or before the due date (including extensions) of the income tax return for the taxable year in which the net capital gain is recognized. The net capital gain taken into account as investment income under this election is not eligible to be taxed at capital gain rates.

Under § 301.9100-1(c), the Commissioner has discretion to grant a reasonable extension of time to make a regulatory election under all subtitles of the Code except subtitles E, G, H, and I, provided that the taxpayer acted reasonably and in good faith and granting relief will not prejudice the interests of the Government. For this purpose § 301.9100-1(b) defines the term "regulatory election" to include an election whose deadline is prescribed by a revenue ruling, revenue procedure, notice or announcement published in the Internal Revenue Bulletin.

Section 301.9100-3 provides extensions of time to make regulatory elections under

Code sections other than those for which § 301.9100-2 expressly permits automatic extensions. Requests for extensions of time for regulatory elections will be granted when the taxpayer provides evidence (including affidavits described in the regulations) to establish to the satisfaction of the Commissioner that the taxpayer acted reasonably and in good faith and granting relief will not prejudice the interests of the government.

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

- (i) requests relief before the failure to make the regulatory election is discovered by the Service;
- (ii) inadvertently failed to make the election because of intervening events beyond the taxpayer's control;
- (iii) failed to make the election because, after exercising due 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.

The affidavits presented show that you acted reasonably and in good faith, having reasonably relied on Accountant, a qualified tax professional who failed to make, or advise you to make, the election on behalf of Taxpayer.

Under § 301.9100-3(b)(3), a taxpayer will not be considered to have acted reasonably and in good faith if the taxpayer—

- (i) seeks to alter a return position for which an accuracy-related penalty has been or could be imposed under § 6662 at the time the taxpayer requests relief (taking into account § 1.6664-2(c)(3)) and the new position requires a regulatory election for which relief is requested;
- (ii) was informed in all material respects 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 original deadline that make the election advantageous to a taxpayer, the Service will not ordinarily grant relief.

Taxpayer is not seeking to alter a return position for which an accuracy-related penalty has been or could be imposed under § 6662 at the time relief is requested. Taxpayer

was not informed of all material respects of the election and its tax consequences. Furthermore, Taxpayer is not using hindsight in requesting relief. Taxpayer has represented that specific facts have not changed since the original deadline that made the election advantageous.

Section 301.9100-3(c)(1)(i) provides, in part, that the interests of the government are prejudiced if granting relief would result in the 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)(1)(ii) provides, in part, that the interests of the government are ordinarily prejudiced if 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.

Under these criteria, the interests of the government are not prejudiced in this case. Taxpayer has represented that granting relief would not result in a lower tax liability in the aggregate for all taxable years affected by the election than Taxpayer would have had if the election had been made timely (taking into account the time value of money). Furthermore, the taxable year in which the regulatory election should have been made and any taxable years that would have been affected by the election had it been timely made are not closed by the period on assessment.

RULING

An extension of time is hereby granted pursuant to §§ 301.9100-1 and 301.9100-3 for Taxpayer to make the election under § 163(d)(4)(B)(iii) to take net capital gain from the disposition of property held for investment into account as investment income for Year 1. This extension shall be for a period of **60 days** from the date of this ruling.

CAVEATS

This ruling is limited to providing an extension of time for making an election under § 163(d)(4)(B)(iii). It does not provide relief from any liability incurred as a result of filing a late return; nor is it a ruling that the Taxpayer is otherwise eligible to make the election. No opinion is expressed as to the application of any other provision of the Code or the regulations which may be applicable under these facts.

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

The ruling contained in this letter is based upon information and representations submitted and accompanied by a penalty of perjury statement executed by an appropriate party. While this office has not verified any of the material submitted in support of the request for rulings, it is subject to verification on examination.

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to Taxpayer's authorized representative.

Sincerely,

Thomas A. Luxner
Chief, Branch 1
(Income Tax & Accounting)