

**Internal Revenue Service**

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Person To Contact: \_\_\_\_\_, ID No.

Telephone Number:

Refer Reply To:  
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TY:

Legend:

- Taxpayer-Husband=
- Taxpayer-Wife=
- Taxpayers=
- Firm=
- Year1=
- Year2=
- Year3=
- Year4=

Dear \_\_\_\_\_ :

This is in response to the letter dated \_\_\_\_\_, submitted on your behalf by your authorized representative. In the letter you request a revocation under § 1.163(d)-(1)(c) of the Income Tax Regulations of the elections previously made to exclude qualified dividend income as investment income under § 163(d)(1) for Year1, Year2, and Year3. Additionally you request an extension of time to make a late election to treat qualified dividend income as investment income under §§ 163(d)(1) and 163(d)(4)(B) of the Internal Revenue Code for Year4. 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-Husband is a shareholder/employee of a closely held C-corporation.  
Taxpayer-Wife is an employee of a regional rehabilitation provider.

In \_\_\_\_\_, Taxpayer-Husband purchased \_\_\_\_\_ of the outstanding shares of a closely held C-corporation with debt proceeds. Taxpayer-Husband was also an employee of the corporation for many years prior to the purchase and meets the material participation

standard for the corporation's business activities. Under § 163(d)(5), the interest expense incurred to carry C-corporation stock is investment interest subject to the net investment income limitation.

Taxpayers timely filed Form 1040 for Year1, Year2, and Year3. The returns were prepared by Taxpayers' former CPA whom Taxpayers had relied upon for many years. In \_\_\_\_\_, Taxpayers retained Firm to prepare Taxpayers' Year4 federal income tax return and to review Taxpayers' previous tax returns along with the corporate returns of the corporation with which Taxpayer-Husband is employed.

Upon review, Firm determined that the former CPA did not make or advise Taxpayers to make an election under § 163(d)(4)(B)(iii) to include qualified dividends in investment income. Instead the former CPA's tax preparation software by default automatically excluded qualified dividends from the calculation of total investment income. Thus, for Year1, Year2, and Year3, Taxpayers' returns included Form 4952, Investment Interest Expense Deduction, however, qualified dividends were excluded from investment income on the forms. Taxpayers informed Firm that they were unaware of any alternatives to their tax situation.

Accordingly, Firm advised Taxpayers to request a private letter ruling requesting (1) a revocation of the elections previously made to exclude qualified dividend income from investment income and elect to treat qualified dividend income as investment income for Year1, Year2, and Year3; and (2) an extension of time for making the election to treat qualified dividend income as investment income Year4.

The return for Year4 has not yet been filed. The request for an extension of time to make a late election to treat qualified income as investment income for Year4 is filed as a protective claim in the event this matter is not resolved before the Taxpayers' current filing deadline.

#### APPLICABLE LAW

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 for any taxable year shall not exceed the net investment income of the taxpayer for the taxable year.

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

(i) gross income from property held for investment (other than any 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 solely by 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)(II) (or, if lesser, the net gain referred to in clause (ii)(I)) as the taxpayer elects to take into account under this clause. Such term shall include qualified dividend income (as defined in section 1(h)(11)(B)) only to the extent the taxpayer elects to treat such income as investment income for purposes of this subsection.

Section 1.163(d)-1(b) of the Income Tax Regulations provides that the election for qualified dividend income must be made on or before the due date (including extensions) of the income tax return for the taxable year in which the qualified dividend income is received.

Section 1.163(d)-1(c) provides that the election under § 163(d)(4)(B) is revocable with the consent of the Commissioner.

Sections 301.9100-1 through 301.9100-3 of the Procedure and Administration Regulations provide the standards the Commissioner uses to determine whether to grant an extension of time to make a regulatory election. Section 301.9100-2 provides automatic extensions of time for making certain elections. Section 301.9100-3 provides extensions of time for making elections that do not meet the requirements of § 301.9100-2.

Section 301.9100-1(b) defines the term "regulatory election" as an election whose due date is prescribed by a regulation published in the Federal Register, or a revenue ruling, revenue procedure, notice or announcement published in the Internal Revenue Bulletin.

Section 301.9100-1(c) provides that the Commissioner may grant a reasonable extension of time to make a regulatory election, or a statutory election (but no more than six months except in the case of a taxpayer who is abroad), under all subtitles of the Internal Revenue Code except subtitles E, G, H, and I.

Section 301.9100-3(a) provides that requests for extensions of time for regulatory elections (other than automatic changes covered under § 301.9100-2) will be granted when the taxpayer provides evidence to establish to the satisfaction of the Commissioner 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) provides 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.

Section 301.9100-3(b)(3) provides that 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 could be imposed under section 6662 at the time the taxpayer requests relief 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.

Section 301.9100-3(c)(1) provides that the Commissioner will grant a reasonable extension of time only when the interests of the Government will not be prejudiced by the granting of relief. Under paragraph (c)(1)(i), 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.

## CONCLUSION

Taxpayers' election is a regulatory election, as defined under § 301-9100-1(b), because the due date of the election is prescribed in the regulations under § 1.163(d)-1(b). In the present situation, the requirements of §§ 301.9100-1 and 301.9100-3 of the regulations have been satisfied. The information and representations made by Taxpayers establish that Taxpayers acted reasonably and in good faith with this request. Taxpayers reasonably relied on tax professionals for the filing of their returns and upon discovery of the errors promptly requested relief. Furthermore, granting an extension will not prejudice the interests of the Government. It is represented that the Taxpayers will not

have a lower tax liability in the aggregate for all taxable years affected by the election if given permission to make the election in the appropriate amount at this time than Taxpayers would have if the election were made in the appropriate amount by the original deadline for making the election. Accordingly, Taxpayers are granted an extension of time for making the election until 60 days following the date of this ruling. The election should be made by filing a revised Form 4952 and Schedule D, and by including a copy of this ruling with an amended return for Year4. Additionally, Taxpayers are granted consent to revoke the first election made on the Year1, Year2, and Year3 returns.

These rulings are based upon information and representations submitted by Taxpayers and accompanied by a penalty of perjury statement. 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.

Except as expressly provided herein, no opinion is expressed or implied concerning the federal income tax consequences of any aspect of any transaction or item discussed or referenced in this ruling.

Under the powers of attorney on file in this office, a copy of this ruling is being sent to your authorized representatives.

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

Sincerely,  
GEORGE BLAINE  
Associate Chief Counsel  
(Income Tax & Accounting)

Thomas D. Moffitt  
THOMAS D. MOFFITT  
Branch Chief