

**Internal Revenue Service**

Department of the Treasury  
Washington, DC 20224

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Person To Contact:  
, ID No.  
Telephone Number:

Refer Reply To:  
CC:ITA:B03  
PLR-104128-08  
Date: May 30, 2008

TY:

Legend

Taxpayer =  
Year 1 =  
Year 2 =  
Accounting Firm =  
Year 3 =  
Year 4 =

Dear :

This is response to a letter dated . You requested an extension of time to make an election under sections 163(d)(1) and 163(d)(4)(B) of the Internal Revenue Code to treat capital gains as investment income for Year 1. The request to make the late election is based on sections 301.9100-1 and -3 of the Procedure and Administration Regulations.

FACTS

The taxpayer received only passive income in Year 1 from real estate investment development activities commenced in prior years. The taxpayer suffers from severe depression, diabetes, heart disease and acute bi-polar disorder and has been in and out of mental facilities for lengthy periods of time since Year 1. The taxpayer has no one else to take care of his financial affairs. The taxpayer failed to file his tax return for Year 1.

In Year 2, the taxpayer received notice from the Service regarding his unfiled tax return for Year 1. The taxpayer immediately contacted Accounting Firm, who began preparing his return for Year 1. In Year 3, the Service filed a Notice of Deficiency for Year 1. Subsequently, a Petition was filed with the Tax Court. The taxpayer filed his

return for Year 1 in Year 3 with a Form 4592 election to treat capital gains as investment income.

#### 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 section 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 such clause.

Section 163(d)(4)(B) also states that such term shall include qualified dividend income (as defined in section (1)(h)(ii)(B)) only to the extent the taxpayer elects to treat such income as investment income for purposes of this subsection.

Section 1.163(d)-1T(b) of the Income Tax Regulations provides that the election under section 163(d)(4)(B) 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.

Under section 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, section 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 a regulatory election under Code sections other than those for which section 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 taxpayer acted reasonably and in good faith because his failure to make a timely election was due to intervening events that were beyond his control. These intervening events include his mental illness and hospitalization at the mental health facilities.

Under section 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 section 6662 at the time the taxpayer requests relief (taking into account section 1.6664-02(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 section 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. The 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 the taxpayer would have had if the election had been timely made (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 had it been timely made, are not closed by the period of assessment.

### RULING

Accordingly, the consent of the Commissioner is hereby granted for an extension of time to make the election pursuant to section 301.9100-1 and -3 for the taxpayer under section 163(d)(4)(B). The taxpayer has an extension of 60 days from date of this ruling in which to make this election.

This ruling is limited to providing an extension of time for making an election under section 163(d)(4)(B). It does not provide relief from any liability incurred as a result of filing a late election; nor is it a ruling that the taxpayer is otherwise eligible to make the election. No opinion is expressed as to the applicability 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.

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

A copy of this letter must be attached to any income tax return to which it is relevant. Alternatively, taxpayers filing their returns electronically may satisfy this requirement by attaching a statement to their return that provides the date and control number of the letter ruling.

The rulings contained in this letter are based upon information and representations submitted by the taxpayer 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.

Sincerely,

Christopher F. Kane  
Branch Chief, Branch 3  
(Income Tax & Accounting)