

**Internal Revenue Service**

Department of the Treasury  
Washington, DC 20224

Number: **201110002**  
Release Date: 3/11/2011  
Index Number: 9100.00-00

Third Party Communication: None  
Date of Communication: Not Applicable

Person To Contact:  
, ID No.

Telephone Number:

Refer Reply To:  
CC:ITA:B02  
PLR-124725-10

Date:  
December 02, 2010

TY:

Legend

Taxpayer =

Date =

Year =

a =

Dear :

This ruling letter is in response to your letter dated Date. In your letter, you requested an extension of time to make an election on the amount allowed to be treated as investment income under §§ 163(d)(1) and 163(d)(4)(B) of the Internal Revenue Code for Year. The request is based on §§ 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations.

**FACTS**

Taxpayer, a husband and wife, timely filed a Form 1040, U.S. Individual Tax Return, for Year with a filing status of married filing jointly. Taxpayer included Form 4952, Investment Interest Expense Deduction, with the original tax return for Year. On the Form 4952, Taxpayer elected to treat \$a of net capital gain as investment income in order to offset the amount of investment interest expense. Taxpayer represented that Taxpayer intended to and did elect to convert the Year net capital gain to investment income to allow a deduction for the full amount of investment interest expense for Year.

The Internal Revenue Service (the Service) conducted an examination of Taxpayer's tax return for Year. As a result of the examination, the Service increased the amount of Taxpayer's capital gain and investment interest. Due to the Service's adjustments, the amount of investment income converted from net capital gain originally elected is now insufficient to allow a deduction for an additional amount of investment interest expense claimed.

Taxpayer requests to modify the dollar amount of the election on Form 4952 to treat more net capital gain as investment interest income for the Year taxable year. Taxpayer requests to increase the amount of the election so that the amount of investment income elected allows a deduction for additional investment interest expense in Year, which increased due to the examination.

#### 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 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)(II) (or, if lesser, the net 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 for net capital gain 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 election is made on Form 4952 in accordance with the form and its instructions. The net capital gain taken into account as investment income under this election is not eligible to be taxed at capital gain rates. Section 1.163(d)-1(a). Section 1.163(d)-1(c) provides that the election is revocable with the consent of the Commissioner.

Sections 301.9100-1 through 301.9100-3 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 to make a regulatory election for requests 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, 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 6 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. 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 the grant of relief will not prejudice the interests of the government. Section 301.9100-3(a).

Section 301.9100-3(b)(1) provides that a taxpayer is 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) failed to make the election because of 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, including a tax professional employed by the taxpayer, 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 is deemed not to have acted reasonably and in good faith if the taxpayer: (i) seeks to alter a return position for which an accuracy-related penalty was 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 informed in all material respects of the required election and related tax consequences and chose not to file the election; or (iii) uses hindsight in requesting relief.

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 § 6501(a) before the taxpayer’s receipt of a ruling granting relief under this section.

## CONCLUSION

Taxpayer's election is a regulatory election as defined under § 301.9100-1(b) because the due date of the election is prescribed in § 1.163(d)-1(b). Therefore, Taxpayer's request is analyzed under the requirements of § 301.9100-3.

Taxpayer provided information and representations to establish that Taxpayer satisfies the requirements of § 301.9100-3. This information and the representations establish that Taxpayer acted reasonably and in good faith. Taxpayer elected to treat net capital gains as investment income on the original Year return to exactly offset the amount claimed as investment interest expense. As a result of the Service's examination of Taxpayer's income tax return for Year, the amount of Taxpayer's investment interest expense that may be allowable as a deduction increased from the amount originally claimed. Taxpayer now has reason to elect to convert more of the net gain to investment income for Year. Further, granting an extension will not prejudice the interests of the government. Taxpayer represented that Taxpayer will not have a lower tax liability if given permission to make the election in the appropriate amount at this time than Taxpayer would have if the election were made in the appropriate amount by the original deadline for making the election. Also, the Year taxable year will not be closed by the period of limitations on assessment under § 6501(a) before Taxpayer's receipt of this ruling granting relief.

Accordingly, the consent of the Commissioner is hereby granted for Taxpayer to revoke the election to treat net capital gain as investment income that Taxpayer made on the Federal tax return for Year. Further, Taxpayer is granted permission to make a late election to treat net gain from the disposition of investment property as investment income for Year. The extension of time shall be for a period of 60 days from the date of this ruling.

Except as expressly provided herein, 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 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 or amended 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 ruling contained in this letter is 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 a ruling, it is subject to verification on examination.

Sincerely,

Norma C. Rotunno  
Senior Technician Reviewer, Branch 2  
Office of the Associate Chief Counsel  
(Income Tax & Accounting)

cc: