

**Internal Revenue Service**

Department of the Treasury  
Washington, DC 20224

Number: **201136005**  
Release Date: 9/9/2011

Third Party Communication: None  
Date of Communication: Not Applicable  
Person To Contact:

Index Number: 9100.00-00  
163.00-00

, ID No.  
Telephone Number:

Refer Reply To:  
CC:ITA:B02  
PLR-109030-11  
Date:  
May 31, 2011

TY:

Legend

Taxpayers =  
Taxpayer 1 =  
Preparer Firm =  
Preparer CPA 1 =  
Preparer CPA 2 =  
Place A =  
Place B =  
Year 1 =  
Year 2 =  
Year 3 =  
Date 1 =  
Date 2 =  
Date 3 =  
Date 4 =  
Date 5 =  
a =

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

This is in response to the letter dated February 7, 2011, submitted on your behalf by your authorized representative. In the letter, you request an extension of time to make an election to include qualified dividend income in net investment income under sections 163(d)(1) and 163(d)(4)(B) of the Internal Revenue Code for tax year ending Date 1. The request is made in accordance with sections 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations.

## FACTS

Taxpayers are a married couple filing a joint income tax return. Taxpayers engaged certified public accounting firm Preparer Firm to prepare their Year 2, Year 3 and Year 1 federal individual income tax returns.

Taxpayers originally contemplated preparing their Year 1 individual income tax return using a purchased software package instead of using Preparer Firm. Preparer CPA 1 had provided accounting and tax services to Taxpayer 1's father for a long time and in an e-mail to Taxpayer 1 dated Date 2, Preparer CPA 1 encouraged Taxpayers to again utilize Preparer Firm in the preparation of their Year 1 individual income tax return. Taxpayers subsequently decided to again utilize Preparer Firm and forwarded their tax return information to the Place A office of Preparer Firm on Date 3. Preparer Firm prepared the Year 1 return which was electronically filed on Date 4.

The balance due was larger than Taxpayers expected. Taxpayers requested that Preparer CPA 1 and Preparer CPA 2 review the federal individual income tax return for Year 1. This review identified that Preparer Firm had failed to advise that Taxpayers make an election on Form 4952, Investment Interest Expense Deduction, to treat certain qualified dividend income as investment income. The return preparer did not advise Taxpayers to make the election. If the election had been made, the Federal income tax would have decreased by \$a.

Taxpayers are individuals and use the cash method of accounting as their overall method of accounting. Taxpayers have a taxable year ending Date 5.

## LAW AND 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 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 includes 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 301.9100-1(c) provides that the Commissioner of Internal Revenue, in exercising his discretion, may grant a reasonable extension of time under the rules set forth in section 301.9100-3 to make a regulatory election. The term "regulatory election" is defined in section 301.9100-1(b) 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 301.9100-3(a) provides that requests for relief will be granted when the taxpayer provides the evidence 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.

Under section 301.9100-3(b)(1)(i) and (v), except as provided in paragraphs (b)(3)(i) through (iii), a taxpayer is deemed to have acted reasonably and in good faith if the taxpayer requests relief before the failure to make the regulatory election is discovered by the Internal Revenue Service, or if the taxpayer reasonably relied on a qualified tax professional who failed to make, or failed to advise the taxpayer to make, the election.

Paragraphs (b)(3)(i) through (iii) of section 301.9100-3 provide 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 could be imposed under section 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, 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. In such a case, the Service will grant relief only when the taxpayer provides strong proof that the taxpayer's decision to seek relief did not involve hindsight.

Section 301.9100-3(c)(1) provides 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. 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 section 6501(a) before the taxpayer's receipt of a ruling granting relief under this section.

## CONCLUSION

The taxpayers' election is a regulatory election, as defined under section 301.9100-1(b), because the due date of the election is prescribed in the regulations under section 1.163(d)-1(b). In the present situation, the requirements of sections 301.9100-1 and 301.9100-3 of the regulations have been satisfied. The information and representations made by Taxpayers establish that they acted reasonably and in good faith with this request. The affidavits presented show that they requested relief before the failure to make the election was discovered by the Service and they reasonably relied on a tax professional for the filing of their federal income tax return, however, the tax professional failed to make, or advise Taxpayers to make the election. The affidavits presented show that Taxpayers were unaware of the necessity for the election and, upon discovery of the error, promptly requested relief.

Taxpayers are not seeking to alter a return position for which an accuracy-related penalty had been or could be imposed under section 6662 at the time relief was requested. Taxpayers were not informed in all material respects of the required election, and its related tax consequences. Taxpayers are not using hindsight in requesting relief. Finally, granting an extension will not prejudice the interests of the Government. Taxpayers have represented that they 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 they would have had if the election were made in the appropriate amount by the original deadline for making the election. Taxpayers have represented that the granting of an extension will only affect the timing of when they will incur the tax liability. 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 of limitation on assessment.

Accordingly, Taxpayers are granted an extension of time of 60 days from the date of this letter to make the election.

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.

A copy of this letter must be attached to any income tax return to which it is relevant. Alternatively, a taxpayer filing returns electronically may satisfy this requirement by attaching a statement to the 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.

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.

Sincerely,

---

R. Matthew Kelley  
Assistant to the Branch Chief, Branch 2  
Office of the Associate Chief Counsel  
(Income Tax & Accounting)

cc: