**Internal Revenue Service**

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Department of the Treasury
Washington, DC 20224

Third Party Communication: None
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Person To Contact:
, ID No.
Telephone Number:

Refer Reply To:
CC:ITA:B02
PLR-105684-11

Date:
July 28, 2011

TY:

Legend

Taxpayer =
Year 1 =
Year 2 =
Date 1 =
Date 2 =
Date 3 =
Certified Public Accountants =

Certified Public Accountant =
a =
b =
c =
d =

Dear :

This is in response to your letter dated February 2, 2011. In the letter you request an extension of time to file an election on Form 4952, Investment Interest Expense Deduction, pursuant to § 163(d)(4)(B)(iii) of the Internal Revenue Code to treat qualified dividends and net capital gains as investment income for the Year 1 taxable year. The request is made in accordance with §§ 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations.

FACTS

Taxpayer is an individual and uses the cash method of accounting as his overall method of accounting. Taxpayer has a taxable year ending Date 3.

Taxpayer filed his original Form 1040 for the taxable year ending Date 1, on or about Date 2. Taxpayer amended the Year 1 Form 1040 for reasons unrelated to this request. On the original and amended Year 1 Forms 1040, Taxpayer reported net capital gains of $a and qualified dividends of $b. In Year 1, Taxpayer incurred investment interest expense of $c, and carried over investment interest expense of $d to Year 1 from prior years. Taxpayer did not make an election under § 163(d)(4)(B)(iii) to treat qualified dividends as investment income.

Taxpayer engaged and relied upon the accounting firm of Certified Public Accountants to prepare his Year 1 Form 1040. During the course of the preparation, the Certified Public Accountants did not inform taxpayer that an election under § 163(d)(4)(B)(iii) was available and taxpayer was unaware such an election existed.

In preparing taxpayer's Year 2 Form 1040, Certified Public Accountant, a member of the Certified Public Accountants, noticed that taxpayer incurred significant capital gains and that taxpayer had significant interest expense carryovers. In looking at returns for prior years, Certified Public Accountant realized that there was also a significant capital gain on the Year 1 return and that due to the Certified Public Accountants' oversight, the Certified Public Accountants had not advised taxpayer to make the election under § 163(d)(4)(B)(iii). Upon discovering that the election had not been made for the Year 1 taxable year, Certified Public Accountant advised taxpayer to submit a letter ruling requesting permission to file a late election.

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 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.

The term investment income 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 301.9100-1(c) of the Procedure and Administration Regulations provides that the Commissioner of Internal Revenue, in exercising his discretion, may grant a reasonable extension of time under the rules set forth in § 301.9100-3 to make a regulatory election under all subtitles of the Internal Revenue Code except subtitles E, G, H, and I. The term "regulatory election" is defined in § 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, or announcement published in the Internal Revenue Bulletin.

Section 301.9100-3(a) provides that requests for relief subject to this section 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 § 301.9100-3(b)(1), except as provided in § 301.9100-3(b)(3) (i) through (iii), a taxpayer is deemed to have acted reasonably and in good faith if the taxpayer:

(i) requested relief under this section before the failure to make the regulatory election was discovered by the Internal Revenue 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 (taking into account the taxpayer's experience and the complexity of the return or issue), the taxpayer was unaware of the necessity for the election;

(iv) reasonably relied on the written advice of the Internal Revenue 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.

Paragraphs (b)(3)(i) through (iii) of § 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 § 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 § 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 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 taxpayer establish that he acted reasonably and in good faith. The affidavits presented show that taxpayer reasonably relied on qualified tax professionals for the filing of taxpayer's return, however, the tax professionals failed to make, or advise taxpayer to make, the election. The affidavits presented show that taxpayer was unaware of the necessity for the election and, upon discovery of the error by Certified Public Accountant, promptly requested relief.

The information and representations presented establish that taxpayer is not seeking to alter a return position for which an accuracy-related penalty had been or could be imposed under § 6662 at the time relief was requested. Taxpayer was not informed in all material respects of the required election, and its related tax consequences. Furthermore, taxpayer is not using hindsight in requesting relief, and no facts have changed since the time of the original filing deadline.

Finally, granting an extension will not prejudice the interests of the Government. It is represented that taxpayer 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 taxpayer would have had if the election were made in the appropriate amount by the original deadline for making the election. Taxpayer has represented that the granting of an extension will only affect the timing of when he will incur the tax liability. Moreover, 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 limitations on assessment.

Accordingly, taxpayer is granted an extension of time of 60 days from the date of this letter to make the election to treat qualified dividends and net capital gains as investment income for the Year 1 taxable year. The election should be made by filing a Form 4952 and by including a copy of this ruling with an amended return for the Year 1

taxable year. 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.

This ruling is conditioned upon taxpayer filing an amended return for the Year 2 taxable year to remove any investment interest expense deduction that is reported on his amended Year 1 Form 1040X in accordance with this letter ruling and making any adjustments necessary to properly reflect the reporting of the investment interest expense. Any such amended Year 2 Form 1040 must be filed within 60 days of the date of this letter. A copy of this letter should be attached to the return. If taxpayer fails to treat the interest expense as described above, this letter ruling shall be null and void.

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.

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,

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