

**Internal Revenue Service**

Department of the Treasury  
Washington, DC 20224

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In Re:

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Date:  
September 02, 2011

LEGEND:

Taxpayers =

Taxpayers' IDs =

Taxable Year =

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

This letter responds to your letter dated March 28, 2011 requesting an extension of time to make an election under § 172(b)(1)(H) of the Internal Revenue Code. In particular, Taxpayers request that Taxpayers be granted additional time to make the election under § 301.9100-3 of the Income Tax Regulations. We rely on the facts and conditions set forth in Taxpayers' submissions dated March 28, 2011.

Taxpayers sustained a net operating loss (NOL) in Taxable Year. Taxpayers represent that they have no tax-related education, skills, or training, and have always relied on qualified tax professionals to prepare their tax returns and provide general tax advice. For Taxable Year, Taxpayers' accountant prepared the tax return and the application for tentative refund in order to carry back the Taxable Year NOL to each of the 2 years preceding the Taxable Year. Taxpayers represent that their accountant did not inform them of the extended carryback rules under § 172(b)(1)(H) and Revenue Procedure 2009-52, 2009-49 I.R.B. 744, which provides guidance on making an election under § 172(b)(1)(H).

Section 172(a) allows a deduction equal to the aggregate of the NOL carryovers and carrybacks to the taxable year. Section 172(b)(1)(A)(i) provides that an NOL for any taxable year generally must be carried back to each of the 2 years preceding the taxable year of the NOL.

Section 172(b)(1)(H)(i) permits a taxpayer to elect to carry back its applicable NOL to 3, 4, or 5 years preceding the taxable year of the applicable NOL. Section 172(b)(1)(H)(ii) provides that the applicable NOL means the taxpayer's NOL for a taxable year ending after December 31, 2007, and beginning before January 1, 2010.

Section 172(b)(1)(H)(iii) provides that the election under § 172(b)(1)(H) is required to be made in a manner prescribed by the Secretary, and must be made by the due date (including extensions) for filing the return for the taxpayer's last taxable year beginning in 2009.

Sections 301.9100-1 through 301.9100-3 provide the standards the Commissioner of Internal Revenue uses to determine whether to grant an extension of time to make statutory and regulatory elections.

Section 301.9100-1(b) defines (A) a statutory election as an election whose due date is prescribed by statute, and (B) a 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 301.9100-2(b) provides a taxpayer with an automatic extension of 6 months from the due date of a timely filed return (excluding extensions), provided the taxpayer takes "corrective action" within that 6-month period. Under § 301.9100-2(b), a taxpayer cannot extend the due date of a statutory election beyond the extended due date of the return on which the election should have been made.

Section 301.9100-3 provides the standard the Commissioner of Internal Revenue uses to determine whether to grant an extension of time to make regulatory elections.

Because the due date for an election under §172(b)(1)(H) is expressly prescribed by the statutory provision, the election is by definition a statutory election within the meaning of § 301.9100-1(b). Revenue Procedure 2009-52 does not dictate the due date for the election, but simply restates the statutory due date with reference to § 172(b)(1)(H). The mere incorporation of a statutory due date does not change a statutory election into a regulatory election.

As a statutory election, § 301.9100-2 applies to determine relief for late elections under § 172(b)(1)(H). Under § 301.9100-2, taxpayers would need to take corrective action within 6 months after the unextended due date for filing their return for Taxpayer's last taxable year beginning in 2009.

While the Service has authority under § 301.9100-3 to grant relief in the case of a regulatory election, § 301.9100-3 does not apply in the case of a statutory election.

Accordingly, the Service does not have authority under § 301.9100-3 to grant an extension to the statutory election as set forth in § 172(b)(1)(H). Under the given facts, information, and representations, § 301.9100-3 relief is not available to Taxpayers.

#### DISCLAIMERS

Except as provided above, no opinion is expressed as to the Federal tax treatment of the transaction under any other provisions of the Internal Revenue Code and the Income Tax Regulations that may be applicable or under any other general principles of Federal income taxation. Neither is any opinion expressed as to the tax treatment of any conditions existing at the time of, nor effects resulting from, the transaction that are not specifically covered by the above ruling.

This ruling is directed only to Taxpayer. Section 6110 (k)(3) provides that it may not be cited as precedent. Pursuant to the Power of Attorney submitted by Taxpayer, a copy of this letter will be sent to Taxpayer's authorized representatives.

Sincerely,

William A. Jackson  
Branch Chief, Branch 5  
Office of Associate Chief Counsel  
(Income Tax and Accounting)