

Internal Revenue Service

Department of the Treasury

Washington, DC 20224

Number: **201219005**

Release Date: 5/11/2012

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-134015-11

Date: January 30, 2012

LEGEND:

Taxpayers =

Advisor =

Date1 =

Year1 =

Dear Taxpayers:

This is in response to your letter dated Date1, submitted on your behalf by your authorized representatives. In the letter you request permission to revoke an election to treat capital gain as investment income under § 163(d)(4)(B)(iii) of the Internal Revenue Code for the Year1 taxable year. The request is based on §§ 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations.

FACTS

For approximately ten years, Taxpayers used the services of Advisor to prepare and file their Federal income tax returns. With regard to their Year1 return, Taxpayers provided Advisor with all documents for use in preparing the return. While preparing Taxpayers' return, Advisor noted that one of Taxpayers' personal loans was secured by securities held in Taxpayers' investment portfolio. Advisor did not contact Taxpayers for the specifics of the loan. Instead, Advisor, based on similar prior transactions entered into by Taxpayers, assumed that the securities were purchased with the loan proceeds at issue, and he assumed that the interest paid on the loan was deductible as investment interest expense under § 163. Advisor reported the interest paid on the loan as

investment interest on Taxpayers' Year1 return, and he included on the return the election to treat a corresponding amount of capital gain as investment income.

Taxpayers' Year1 return was examined by the Internal Revenue Service. To prepare for the initial meeting with the revenue agent, Advisor called Taxpayers to discuss certain issues, one of which was the personal loan. Taxpayers told Advisor that the securities serving as collateral for the underlying loan were not, in fact, purchased with the loan proceeds. Advisor realized he made the mistake on the Year1 return with regard to the investment interest expense deduction. Advisor voluntarily brought the issue to the attention of the revenue agent during their initial meeting, in order to undertake whatever steps were necessary to adjust this item on the return. Accordingly, Taxpayers seek permission to revoke the election to treat capital gain as investment income that they made on their Year1 return.

APPLICABLE 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)(iii) provides, in pertinent part, that investment income includes certain capital gain that the taxpayer elects to treat as investment income.

Section 1.163(d)-1(b) provides that the election under section 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.

Section 1.163(d)-1(c) provides that the election under section 163(d)(4)(B)(iii) is revocable with the consent of the Commissioner.

Taxpayers are requesting permission to revoke their election to treat capital gain as investment income, which was made based on advice from a tax professional. This situation is analogous to situations concerning taxpayers who fail to make a regulatory election because of inadequate or incorrect advice from qualified tax professionals, and who subsequently seek extensions of time to make the election under § 301.9100-1. Rev. Rul. 83-74, 1983-1 C.B. 112.

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 for making elections that do not meet the requirements of section 301.9100-2.

Section 301.9100-1(b) defines the term "regulatory election" to include an election

whose due date is prescribed by a regulation published in the Federal Register.

Section 301.9100-3(a) provides that requests for extensions of time for regulatory elections will be granted when the taxpayer provides evidence to establish to the satisfaction of the Commissioner that the taxpayer acted reasonably and in good faith, and that granting relief will not prejudice the interests of the Government.

Section 301.9100-3(b)(1)(v) provides that a taxpayer will be deemed to have acted reasonably and in good faith if the taxpayer reasonably relied on a qualified tax professional who was aware of all the relevant facts, 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 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 could be imposed under § 6662 at the time the taxpayer requests relief and the new position requires a regulatory election for which relief is requested;

(ii) was fully informed 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 Internal Revenue Service will not ordinarily grant relief.

Section 301.9100-3(c)(1) provides that the Commissioner will grant a reasonable extension of time only when the interests of the Government will not be prejudiced by the granting of relief. Under paragraph (c)(1)(i), the interests of the government are prejudiced if granting relief would result in a 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. Under paragraph (c)(1)(ii), 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).

CONCLUSION

The information and representations made by Taxpayers establish that Taxpayers acted reasonably and in good faith as Taxpayers relied on their Advisor, a qualified tax professional, to prepare their return. Furthermore, granting permission to revoke the election will not prejudice the interests of the Government. It is represented that

Taxpayers will not have a lower tax liability in the aggregate for all taxable years affected by the election if given permission to revoke the election than Taxpayers would have if the election had not been made. Accordingly, Taxpayers are granted permission to revoke the election. Taxpayers should enclose a copy of this letter with their amended return for Year1 within 60 days following the date of this ruling.

The ruling contained in this letter is based upon information and representations submitted by the taxpayers and accompanied by a penalty of perjury statement. 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.

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 taxpayers requesting it. Section 6110(k)(3) 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 representatives.

Sincerely,

R. Matthew Kelley

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