

Internal Revenue Service

Department of the Treasury
Washington, DC 20224

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LEGEND:

Taxpayers =

Taxpayers' IDs =

Taxable Year =

Month 1 =

Month 2 =

CPA =

Dear _____ :

This letter responds to your letter dated November 1, 2011 requesting an extension of time to make an election under § 172(b)(1)(H) of the Internal Revenue Code. In particular, you are requesting that additional time be granted to make the election under § 301.9100-3 of the Income Tax Regulations. We rely on the facts and conditions set forth in your submissions dated November 1, 2011, and March 28, 2012.

Your business consists of constructing houses and condominiums, developing land, and engaging in other activities relating to real estate (the real estate business). Because of adverse changes in the real estate market, you incurred substantial losses attributable to the real estate business which caused you to incur a net operating loss (NOL) in Taxable Year.

For several years a management company provided daily accounting services for the real estate business. However, the downturn in the real estate market resulted in adverse effects on your cash flow. This eventually caused the personnel who worked for the management company to either quit or be laid off. At the end of Month 1, as a

necessary step in preparing your income tax returns for Taxable Year, you hired an outside firm to provide bookkeeping services pertaining to the records of the real estate business. The bookkeeping firm prepared a trial balance for use in preparing your federal income tax return for Taxable Year. Your submission does not indicate whether this was a working trial balance or a final trial balance. However, in any event your federal income tax return for Taxable Year was not prepared and filed by the due date of the return.

You sought tax advice from CPA regarding the filing of your federal income tax return for Taxable Year. CPA advised you not to file a tax return with estimated figures for Taxable Year by the due date for that return because “since there were losses no penalties would be imposed.” Finally, in Month 2, all the necessary work was done to prepare your federal income tax return for Taxable Year and in that month you filed the return. The return was prepared by CPA. However, because the return was filed late, it was filed after the due date for making an election to carry back the NOL either 3, 4, or 5 taxable years under § 172(b)(1)(H).

You have asked us to grant you an extension of time to make a § 172(b)(1)(H) election pursuant to § 301.9100-3 primarily on the grounds that you failed to make a timely election due to reasonable reliance on a professional tax advisor (CPA) who failed to properly advise you.

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, 2009-2 C.B. 744 specifies the manner in which an election under § 172(b)(1)(H) must be made. However, the revenue procedure 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 in a revenue procedure 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 the 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 in you.

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 the taxpayers who requested it. Section 6110 (k)(3) provides that it may not be cited as precedent. Pursuant to the Power of Attorney submitted by you, a copy of this letter will be sent to your authorized representatives.

Sincerely,

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