

**Internal Revenue Service**

Department of the Treasury  
Washington, DC 20224

Number: **201347004**  
Release Date: 11/22/2013  
Index Number: 9100.00-00

[Third Party Communication:  
Date of Communication: Month DD, YYYY]

Person To Contact:  
, ID No.

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Refer Reply To:  
CC:ITA:2  
PLR-110208-13

Date:  
August 30, 2013

Taxpayer =

Year 1 =

Amount 1 =

Dear :

This is in response to a recent letter requesting an extension of time for the taxpayer to make a late election under section 163(d)(4)(B) of the Internal Revenue Code for Year 1. This election seeks to include net capital gains from the disposition of property held for investment in investment income for Year 1. See section 163(d)(4)(B)(iii) and section 1.163(d)-1 of the Income Tax Regulations.

The request to make the late election is based on sections 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations.

**FACTS**

The taxpayer's Year 1 tax return was prepared by CPA Firm. The taxpayer's return was selected for audit by the Internal Revenue Service, initially as to whether or not the taxpayer had properly limited the taxpayer's deduction for mortgage interest expense. Pursuant to a review of the tax return, CPA Firm discovered that through its inadvertence a portion of the mortgage interest expense (totaling Amount 1) listed on the return was actually investment interest expense. This fact was brought to the attention of the examining agent and the agent agreed.

Given that through its own inadvertence CPA Firm was unaware of the increased investment interest expense, the return that it prepared for the taxpayer (which the taxpayer later filed) did not make an election on Form 4952 (Investment Interest Expense Deduction) to treat capital gain as investment income in order to fully deduct

the increased investment interest expense. See I.R.C. § 163(d)(4)(B)(iii). The examining agent denied such election as not made on or before the due date, including extensions, of the tax return. This deadline is established by section 1.163(d)-1 of the Income Tax Regulations.

Currently, the taxpayer's have a petition pending in the United States Tax Court. The two issues are:

(1) whether petitioners are entitled to an extension of time pursuant to Treas. Reg. § 301.9100-3 to make a late election to include part of net capital gains from the disposition of property held for investment in investment income under I.R.C. § 163 for Year 1; and

(2) whether petitioners are liable for an accuracy-related penalty under I.R.C. § 6662 for Year 1.

The Tax Court case has been continued so the taxpayers could follow the procedural requirement of Treas. Reg. § 301.9100-3(e) and request from the Commissioner an extension of time to make the section 163(d)(4)(B)(iii) election.

## LAW & 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 pertinent 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.

To the extent relevant here, 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.

The taxpayer now requests an extension of time to make the election under section 163(d)(4)(B)(iii). The taxpayer's situation is analogous to other taxpayers who: (a) have not made a particular election provided in the regulations because of inadequate or incorrect advice from knowledgeable tax professionals; and (b) subsequently seek extensions of time under § 9100 of the Regulations on Procedure and Administration. See 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 301.9100-1(b) defines the term "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 301.9100-1(c) provides that the Commissioner may grant a reasonable extension of time to make a regulatory election, or a statutory election (but no more than six months except in the case of a taxpayer who is abroad), under all subtitles of the Internal Revenue Code except subtitles E, G, H, and I.

In this case, the taxpayer has represented that the taxpayer is not foreclosed from being granted an extension of time under § 9100 of the Regulations on Procedure and Administration based on any condition contained in section 301.9100-1.

Section 301.9100-3(a) provides that requests for extensions of time for regulatory elections (other than automatic changes covered under section 301.9100-2) 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) provides that a taxpayer will be deemed to have acted reasonably and in good faith if the taxpayer--

- (i) requests relief before the failure to make the regulatory election is discovered by the Service;

- (ii) inadvertently failed to make the election because of intervening events beyond the taxpayer's control;
- (iii) failed to make the election because, after exercising due diligence, the taxpayer was unaware of the necessity for the election;
- (iv) reasonably relied on the written advice of the Service; or
- (v) reasonably relied on a qualified tax professional, and the tax professional failed to make, or advise the taxpayer to make the election.

In this case, the taxpayer has represented that the taxpayer acted reasonably and in good faith because the taxpayer reasonably relied on a qualified tax professional, and the tax professional failed to make, or advise the taxpayer to make, the election. Thus, the taxpayer is not foreclosed from being granted an extension of time under § 9100 of the Regulations on Procedure and Administration based on section 301.9100-3(b)(1).

Under § 301.9100-3(b)(3), 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 has been or could be imposed under § 6662 at the time the taxpayer requests relief (taking into account any qualified amended return filed within the meaning of § 1.6664-2(c)(3)) and the new position requires 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 original deadline that make the election advantageous to a taxpayer, the Service will not ordinarily grant relief.

In this case, the taxpayer has represented that none of the factors set forth in § 301.9100-3(b)(3) above apply. Thus, the taxpayer is not foreclosed from being considered to have acted reasonably and in good faith by any of the conditions contained section 301.9100-3(b)(3).

Section 301.9100-3(c)(1) provides that the Commissioner will grant a reasonable extension of time to make a regulatory election only when the interests of the Government will not be deemed to be prejudiced by the granting of relief. Under

paragraph (c)(1)(i), the interests of the government are deemed to be 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 (taking into account the time value of money). 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 is 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. Paragraph (c)(1)(ii) provides that the IRS may condition a grant of relief on the taxpayer providing the IRS with a statement from an independent auditor certifying that the interests of the government are not prejudiced.

In this case, the taxpayer has represented that the taxpayer is not foreclosed from relief by any of the conditions contained section 301.9100-3(c)(1).

## CONCLUSION

The Commissioner consents to an extension of time (to 60 days following the date of this ruling) for the taxpayer to make the election at issue pursuant to section 163(d)(4)(B)(iii). This election is to be made for Year 1 by filing Form 4952 to include net capital gains from the disposition of property held for investment in investment income. See sections 163(d)(1) and 163(d)(4)(B) of the Internal Revenue Code.

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.

A copy of this letter must be attached to any income tax return to which it is relevant. Alternatively, taxpayers filing their returns electronically may satisfy this requirement by attaching a statement to their 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, it is subject to verification by the Tax Court or by any party with jurisdiction over the matter within the Internal Revenue Service.

Sincerely,

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Thomas D. Moffitt  
Chief, Branch 2  
(Income Tax & Accounting)