Internal Revenue Service

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Department of the Treasury
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Person To Contact:
, ID No.

Telephone Number:

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Date:
January 23, 2015

TY:

LEGEND:

Taxpayers =

Preparer =
CPA =
Year 1 =
Year 2 =
Year 3 =
Date 1 =
Date 2 =
Date 3 =
Date 4 =
Date 5 =
$a =
$b =
$c =
$d =

Dear Taxpayers:

This is in response to your letter dated August 5, 2014, requesting an extension of time to make an election under § 163(d)(4)(B)(iii) of the Internal Revenue Code to include net capital gain income and qualified dividend income in investment income, effective for the taxable year ended Date 1. The request is made in accordance with §§ 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations.

FACTS

Taxpayers file joint returns on Form 1040, U.S. Individual Income Tax Return, on a calendar year basis using the cash method of accounting. Taxpayers incurred investment interest expense of $a in Year 3 and had an investment interest expense carryover from Year 2 of $b. Taxpayers earned $c of net investment income in Year 3. Taxpayers also earned $d of net capital gain and qualified dividend income in Year 3.

Taxpayer engaged and relied on Preparer to prepare their Year 2 and Year 3 Form 1040s. Taxpayers provided Preparer with all relevant information, including their Year 1 Form 1040, and Year 1 investment interest expense carryover.

Preparer delivered Taxpayers' Year 3 Form 1040 for signature and filing on Date 2, just three days before the due date of the return. Taxpayers executed and timely filed the return on Date 3. However, on Date 4, Taxpayers questioned their Preparer why their deduction for investment interest was so low. Taxpayer also asked their CPA to review their Year 3 return for accuracy.

On Date 5, Taxpayers' CPA determined that Preparer had not made an election under § 163(d)(4)(B) to include net capital gain income and qualified dividend income in investment income. Taxpayers were not aware of such an election and notified Preparer of their CPA's finding.

Preparer informed Taxpayers that they inadvertently omitted Taxpayers' Year 1 investment interest expense carryover from Taxpayers' Year 2 Form 1040, and again from Taxpayers' Year 3 Form 1040 and consequently failed to consider whether Taxpayers should have made the election to include net capital gain income and qualified dividend income in investment income under § 163(d)(4)(B) effective for Year 3. Preparer admitted that they failed to inform Taxpayers of the available election. Upon discovering their oversight, Preparer advised Taxpayers to file this request for an extension of time to make the 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 § 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 net capital gains and 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) 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.

Taxpayers' 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 Taxpayers establish that they acted reasonably and in good faith. The affidavits presented show that Taxpayers reasonably relied on qualified tax professionals for the filing of Taxpayers' return, however, the tax professionals failed to make, or advise Taxpayers to make, the election. The affidavits presented show that Taxpayers were unaware of the necessity for the election and, upon discovery of the error by Preparer, promptly requested relief.

The information and representations presented establish that Taxpayers are 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. Taxpayers were not informed in all material respects of the required election, and its related tax consequences. Furthermore, Taxpayers are 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 Taxpayers 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 Taxpayers would have had if the election were made in the appropriate amount by the original deadline for making the election. Taxpayers have represented that the granting of an extension will only affect the timing of when they 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.

CONCLUSION

Accordingly, Taxpayers are granted an extension of time of 60 days from the date of this letter to make an election under § 163(d)(4)(B)(iii) to include net capital gain income and qualified dividend income in investment income, effective for the taxable year ended Date 1. 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 3 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.

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,

Thomas D. Moffitt
THOMAS D. MOFFITT
Chief, Branch 2
Associate Chief Counsel
(Income Tax & Accounting)

cc: