Internal Revenue Service

Department of the Treasury
Washington, DC 20224

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Person To Contact:

ID No.

Telephone Number:

Refer Reply To:
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PLR-115136-22

Date:
February 02, 2023

LEGEND

Taxpayer =

Representative =

Year 0 =

Year 1 =

Year 2 =

Year 3 =

Year 4 =

Year 5 =

Year 6 =

Month A =

Month B =

Company =

Software =

v =

w =

x =

y =

z =

$t =

Dear :

This letter is in response to your letter, dated July 27, 2022, requesting an extension of time, under § 301.9100-1 and -3 of the Regulations on Procedure and Administration, to make an election pursuant to § 1045 of the Internal Revenue Code. Taxpayer, for Year 4, failed to make an election under § 1045 to defer the recognition of gain realized on the sale of qualified small business stock ("QSBS").

FACTS

In Year 1, Taxpayer was employed by Company as the second employee of the startup. Company is represented as having been formed with the intention to be a qualified small business. In Year 1, Taxpayer was granted v shares of Company stock subject to vesting schedule. Taxpayer represents that he filed the appropriate § 83(b) election and followed appropriate § 83(b) procedures for the year of grant.

In Year 2, Taxpayer was granted incentive stock options (ISOs) that entitled Taxpayer to acquire w shares of Company subject to a four-year vesting schedule. In Year 3, Taxpayer was granted ISOs that entitled Taxpayer to acquire x shares of Company subject to a four-year vesting schedule.

In Year 4, Taxpayer was laid off from employment with Company. The ISOs granted in Year 2 and Year 3 were expiring due to the layoff. In Month A of Year 4, Taxpayer sold y shares of Company, granted to him in Year 1, to an unrelated party. At the time of sale, Taxpayer had held the shares for less than 4.5 years.

In Month B of Year 4, Taxpayer used $t of the proceeds from the sale to purchase z shares of Company, amounting to an exercise of only a portion of the total Year 2 and Year 3 ISO grants.

In Year 5, Taxpayer prepared his Year 4 Federal income tax return using Software, a computerized tax return preparation software program sold to the general public. Taxpayer represents that he has used Software to prepare his Federal tax returns since Year 0. Taxpayer represents that he relied on Software's on-screen prompts and instructions to aid him in the preparation process. Taxpayer further represents that Software did not provide any prompts relating to potential § 1045 rollovers. As a result, Taxpayer prepared and filed his Year 4 Federal income tax return reporting the sale of y shares of Company and included all gain derived from the transaction.

In Year 6, Taxpayer came across an article that provided information on the § 1045 deferral election. Taxpayer then reached out to accounting firms and law firms to determine how to address not having made the election. Following Taxpayer's discovery of the article discussing the § 1045 deferral election, Taxpayer engaged Representative to request a private letter ruling seeking relief.

APPLICABLE LAW AND ANALYSIS

Section 1045(a) of the Internal Revenue Code provides, in part, that in the case of any sale of qualified small business stock held by a taxpayer other than a corporation for more than 6 months and with respect to which such taxpayer elects the application of this section, gain from such sale shall be recognized only to the extent that the amount realized on such sale exceeds –

> (1) the cost of any qualified small business stock purchased by the taxpayer during the 60-day period beginning on the date of such sale, reduced by
>
> (2) any portion of such cost previously taken into account under this section.

Section 1045(b)(1) provides that the term "qualified small business stock" has the meaning given such term by § 1202(c). Section 1202(c)(1)(B) provides as one of the defining characteristics of qualified small business stock that it be acquired by the taxpayer at its original issue (directly or through an underwriter) in exchange for money or other property or in exchange for services provided to such corporation was acquired.

Rev. Proc. 98-48, 1998-2 C.B. 367, provides at section 3.01 that a § 1045 election must be made on or before the later of December 31, 1998, or the due date (including extensions) for filing the income tax return for the taxable year in which the qualified small business stock is sold. Rev. Proc. 98-48 generally provides at section 3.02 that the election is made by:

> (a) reporting the entire gain from the sale of qualified small business stock on Schedule D, Capital Gains and Losses, of the return in accordance with instructions for Schedule D;

(b) writing “section 1045 rollover” directly below the line on which the gain is reported; and

(c) entering the amount of the gain deferred under § 1045 on the same line as (b) above, as a loss, in accordance with the instructions for Schedule D.

The Service uses standards set forth in §§ 301.9100-1 through 301.9100-3 to determine whether to grant an extension of time to make a regulatory election. Under § 301.9100-3(a), the Service will grant requests for extensions of time for regulatory elections (other than automatic extensions of time covered in § 301.9100-2) when the taxpayer provides evidence (including affidavits) to establish that the taxpayer acted reasonably and in good faith and granting relief will not prejudice the interests of the Government.

Sections 301.9100-2 and 301.9100-3 provide the standards the Commissioner uses to determine whether to grant an extension of time to make a regulatory election. An extension of time is available for elections that a taxpayer is otherwise eligible to make. However, the granting of an extension of time to make elections is not a determination that the taxpayer is otherwise eligible to make one.

For this purpose, § 301.9100-1(b) defines the term regulatory election to include an election whose deadline is prescribed by a regulation published in the Federal Register, or a revenue ruling, revenue procedure, or notice or announcement published in the Internal Revenue Bulletin. Section 301.9100-3(a) provides, in part, that requests for relief will be granted when the taxpayer provides evidence (including affidavits described in paragraph (e) of this section) 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.

Except as provided in in paragraphs § 301.9100-3(b)(3)(i) through (iii), § 301.9100-3(b)(1) provides that a taxpayer is 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) 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.

Per § 301.9100-3(b)(3), a taxpayer is considered to have not 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 Service will not ordinarily grant relief.

Section 301.9100-3(c)(1) provides that the Service will grant a reasonable extension of time only when doing so will not prejudice the interests of the Government. Section 301.9100-3(c)(1)(i) states that 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 § 301.9100-3(c)(1)(ii), the interests of the Government may be prejudiced if the taxable year in which the regulatory election should have been made, or any taxable years 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.

In addition, § 301.9100-3(e)(3) provides that the taxpayer must provide a detailed affidavit from the individuals having knowledge or information about the events leading to the failure to make a valid regulatory election. The affidavit must describe the engagement and responsibilities of the individual as well as the advice that the individual provided to the taxpayer.

Taxpayer has requested relief in the form of a grant of an extension of time to make a regulatory election pursuant to the provisions of § 301.9100-3. Taxpayer represents that none of the circumstances listed in § 301.9100-3(b)(3) apply. Further, Taxpayer has agreed to extend the period of limitations on assessment.

CONCLUSION

Based on the facts and information submitted and the representations made, we conclude that Taxpayer acted reasonably and in good faith, and that the granting of relief will not prejudice the interests of the government. Therefore, we grant Taxpayer an extension of 60 days from the date of this letter ruling to file an amended return to make a § 1045 election under Rev. Proc. 98-48 for the tax year ending Year 4.

The ruling is based upon information and representations submitted by Taxpayer and accompanied by a penalty of perjury statement executed by appropriate parties. This office has not verified any of the material submitted in support of the request for a ruling.

However, as part of the examination process, the IRS may verify the information, representations, and other data submitted.

Except as expressly provided herein, no opinion is expressed or implied concerning the application of any provision of the Code or the tax consequences of any item discussed or referenced in this letter. Specifically, no opinion is expressed or implied concerning whether the stock sold or purchased by Taxpayer constituted QSBS under § 1202 (or was otherwise eligible to be treated as such) nor whether any shares purchased constituted replacement stock under § 1045.

This letter ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) provides that it may not be used or cited as precedent. A copy of the letter is enclosed showing the deletions proposed to be made when it is disclosed under § 6110.

Pursuant to the Form 2848, *Power of Attorney and Declaration of Representation,* on file, we are sending a copy of this letter to Taxpayer's authorized representative. This letter is being issued electronically in accordance with Rev. Proc. 2020-29, 2020-21 I.R.B. 859. A paper copy will not be mailed to Taxpayer.

Sincerely,

Mon Lam
Senior Counsel, Branch 4
Office of Associate Chief Counsel
(Income Tax & Accounting)

cc: