

## Internal Revenue Service

Department of the Treasury

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Date:

December 15, 1999

### LEGEND:

X =

Date 1 =

Date 2 =

Date 3 =

Date 4 =

Month 1 =

Dear

This ruling is in reply to the letter and enclosures requesting an extension of time under § 301.9100-1 of the Procedure and Administration Regulations for X to file a Form 3115, Application for Change in Accounting Method, which is to be effective for the tax year ended Date 1. This request was made in accordance with § 301.9100-3.

X was incorporated on Date 2. X's shareholders transferred property to the newly formed corporation on Date 3, in a transfer pursuant to § 351 of the Internal Revenue Code, and began doing business in corporate form. Prior to Date 3, X's shareholders had conducted their business operations in the form of sole proprietorships.

X sought to use the special method of accounting provided by Rev. Proc. 71-21, 1971-2 C.B. 549, to account for payments received in one taxable year for services to be performed by the end of the next succeeding taxable year. In Month 1, X's accountant determined that X had not filed a Form 3115 during the tax year ending Date 1 to properly adopt this method of accounting under the particular circumstances presented. This failure to file was not intentional, but was due to the fact that X's prior accountant, upon whom X had relied to identify and prepare any filing required in order for it to adopt the method of accounting set forth in Rev. Proc. 71-21, had not advised X of the need to file a Form 3115. Soon after discovery of the failure to file a Form 3115, this request for relief was submitted.

PLR-115697-99

Under § 301.9100-1(c), the Commissioner has discretion to grant a reasonable extension of the time to make a regulatory election under all subtitles of the Code except subtitles E, G, H, and I, provided that the taxpayer acted reasonably and in good faith and granting relief will not prejudice the interests of the Government. Section 301.9100-1(b) defines 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. An election is defined in § 301.9100-1(b) to include a request to adopt, change, or retain an accounting method or accounting period.

Section 301.9100-2 sets forth rules governing automatic extensions for regulatory elections. If the provisions of § 301.9100-2 do not apply to a taxpayer's situation, the provisions of § 301.9100-3 may apply.

Section 301.9100-3 sets forth the standards that the Commissioner will use in determining whether to grant an extension of time to make a regulatory election. It also sets forth information and representations that must be furnished by the taxpayer to enable the Internal Revenue Service to determine whether the taxpayer has satisfied these standards. The standards to be applied in this case are whether the taxpayer acted reasonably and in good faith and whether granting relief would prejudice the interests of the Government.

Under § 301.9100-3(b)(1)(i), a taxpayer that applies for relief for failure to make an election before the failure is discovered by the Service ordinarily will be deemed to have acted reasonably and in good faith. However, pursuant to § 301.9100-3(b)(3) a taxpayer will not be considered to have acted reasonably and in good faith if the taxpayer 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 and the new position requires or permits a regulatory election for which relief is requested or if the taxpayer was informed in all material respects of the required election and related tax consequences but chose not to file the election. Furthermore, a taxpayer ordinarily will not be considered to have acted reasonably and in good faith if the taxpayer uses hindsight in requesting relief.

Section 301.9100-3(c)(1)(i) provides 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 tax years affected by the regulatory election than the taxpayer would have had if the election had been timely made (taking into account the time value of money).

Section 301.9100-3(c)(2)(i) provides that the interests of the Government are deemed to be prejudiced except in unusual and compelling circumstances if the accounting method regulatory election for which relief is requested is subject to the procedure described in § 1.446-1(e)(3)(i) of the Income Tax Regulations (requiring the

PLR-115697-99

advance written consent of the Commissioner).

Rev. Proc. 71-21 provides that accrual method taxpayers in certain specified and limited circumstances are allowed to defer the inclusion in gross income for Federal income tax purposes of payments received (or amounts due and payable) in one taxable year for services to be performed by the end of the next succeeding taxable year. Section 5.01 of Rev. Proc. 71-21 provides that the adoption of the method prescribed for payments received by a taxpayer will be treated in the same manner as a change in method of accounting subject to the consent requirements of § 446(e) if the payments are for services of a type which were performed by a related person as defined in section 3.10 (or a predecessor thereof) within any of the five taxable years of such person (or predecessor) preceding the taxable year of the adoption. Section 3.10 of Rev. Proc. 71-21 provides that a person is related to the taxpayer if the taxpayer and such other person are owned or controlled directly or indirectly by the same interests within the meaning of § 482 and § 1.482-1(a).

Rev. Proc. 97-27, 1997-1 C.B. 680, provides the general procedures under § 446(e) and § 1.446-1(e) for obtaining consent of the Commissioner to change a method of accounting for federal income tax purposes. Section 5.01(1)(a) of Rev. Proc. 97-27 provides that a Form 3115 must be filed during the year of change and section 5.01(2) provides that a taxpayer that fails to file a Form 3115 during the year of change as provided will not be granted an extension of time to file under § 301.9100 except in unusual and compelling circumstances.

In the present situation, X has not met the requirements for relief under § 301.9100 because X has not shown unusual and compelling circumstances. Accordingly, X's request for relief under § 301.9100-1 is denied.

If X desires to adopt the method of accounting provided by Rev. Proc. 71-21 for the tax year ended Date 4, we will consider such request as timely filed, provided that a Form 3115 with the appropriate user fee in accordance with Rev. Proc. 97-27 is filed within 60 days from the date of this letter. Please attach a copy of this letter to X's Form 3115, if it is decided that such a change will be requested.

No opinion is expressed as to the application of any other provisions of the Internal Revenue Code or the Income Tax Regulations which may be applicable to the transaction.

This ruling is directed only to the taxpayer who requested it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

In accordance with the terms of a power of attorney on file with this office, a copy of this ruling is being sent to X's authorized representative.

PLR-115697-99

Sincerely yours,

Heather Maloy  
Acting Assistant Chief Counsel  
(Income Tax and Accounting)

By

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James Atkinson  
Acting Deputy Assistant Chief Counsel