

# Internal Revenue Service

Number: **200333028**  
Release Date: 8/15/2003  
Index Nos: 9100.00-00, 163.00-00

## Department of the Treasury

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Date: 5/14/03

Taxpayer     =  
CPA            =  
Firm           =  
Year1         =  
Year2         =  
Year3         =  
Date1         =

Dear           :

This is in response to Taxpayer's letter dated January 30, 2003. Taxpayer requested an extension of time to make a late election to include part of net capital gains from the dispositions of property held for investment in investment income under §163(d)(4)(B)(iii) of the Internal Revenue Code for Year1 and Year2. The request to make the late election is based on §§ 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations.

### FACTS

Taxpayer, an individual, had net capital gain income in Year1 and Year2 from the sale of \_\_\_\_\_ and the sale of \_\_\_\_\_ held for investment. In computing taxable income for Year1 and Year2, Taxpayer did not elect on Form 4952, Investment Interest Expense Deduction, to include any part of net capital gain in investment income. Taxpayer's failure to make such an election resulted in an understatement of investment interest expense deductions in Year1 and Year2.

Taxpayer relied on CPA to complete and timely file Forms 1040 for Year1 and Year2. Taxpayer had employed CPA for several years. On Date1, Taxpayer retained Firm to prepare Taxpayer's Year3 federal income tax return and to review Taxpayer's prior tax returns, including the Year1 and Year2 returns. Upon review, Firm determined

that CPA did not make or advise Taxpayer to make an election under § 163(d)(4)(B)(iii). Firm advised Taxpayer that amended returns could not be filed until a request for a letter ruling requesting an extension of time to make a late election was filed and approved.

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.

Section 1.163(d)-1(b) of the Income Tax Regulations provides that the election under § 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.

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 301.9100-2 provides automatic extensions of time for making certain elections. Section 301.9100-3 provides extensions of time for making elections that do not meet the requirements of § 301.9100-2.

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.

Section 301.9100-3(a) provides that requests for extensions of time for regulatory elections (other than automatic changes covered under 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.

Section 301.9100-3(b)(3) provides that 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 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 Commissioner will grant a reasonable extension of time only when the interests of the Government will not be prejudiced by the granting of relief. Under paragraph (c)(1)(i), 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 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 § 6501(a) before the taxpayer's receipt of a ruling granting relief under this section.

### DISCUSSION

Taxpayer's 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 have been satisfied. The information and representations made establish that Taxpayer acted reasonably and in good faith with this request. It has been represented that Taxpayer was unaware of the necessity for the election at the due dates of the income tax returns for Year1 and Year2. It has been represented that Taxpayer reasonably relied on CPA, a qualified tax professional, who failed to make or advise Taxpayer to make an election under § 163(d)(4)(B)(iii).

Furthermore, granting an extension will not prejudice the interests of the Government. Taxpayer has represented that granting relief will not result in Taxpayer having a lower tax liability in the aggregate for Year1 and Year2 than Taxpayer would have had if the election had been timely made. Taxpayer has also represented that Year1 and Year2, in which the regulatory elections should have been made, will not be closed by the period of limitations on assessment under § 6501(a) before Taxpayer's receipt of the ruling granting an extension of time to make a late election.

### RULING

Taxpayer is granted an extension of time for making the election until 60 days following the date of this ruling. The election should be made by filing Form 4952 and by including a copy of this ruling with amended returns for Year1 and Year2.

This ruling is based upon information and representations submitted by Taxpayer and accompanied by a penalty of perjury statement. While this office has not verified any of the material submitted in support of the request for ruling, it is subject to verification on examination.

Except as expressly provided herein, no opinion is expressed or implied concerning the federal income tax consequences of any aspect of any transaction or item discussed or referenced in this ruling.

This letter is sent under the provisions of a power of attorney on file with this office. A copy of the letter is being sent to Taxpayer.

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.

Sincerely yours,

ROBERT M. BROWN  
Acting Associate Chief Counsel  
(Income Tax & Accounting)

By: Clifford M. Harbourt  
CLIFFORD M. HARBOURT  
Senior Technician Reviewer, Branch 2

cc: