

Rev. Proc. 2005-33

SECTION 1. PURPOSE

This revenue procedure provides guidance on exhausting administrative remedies prior to seeking a declaratory judgment pursuant to section 7479 of the Internal Revenue Code. A declaratory judgment may be requested from the United States Tax Court when an executor has made an election under section 6166 to extend the time for payment of estate tax with respect to an interest in a closely held business, and the Internal Revenue Service has (1) made a determination that the election cannot be made with respect to the estate or with respect to any property included therein, (2) failed to make a determination with respect to the estate or with respect to any property included therein within 180 calendar days after the executor's filing of the election, or (3) made a determination that the extension of time for payment under section 6166 has ceased to apply with respect to the estate or with respect to any property included therein.

SECTION 2. DEFINITIONS

For purposes of this revenue procedure—

(1) any reference to “executor” refers to the executor as defined in section 2203;

(2) any reference to “applicant” refers to the person (or persons) authorized to file a petition with the Tax Court pursuant to section 7479;

(3) any reference to “determination” refers to a determination by the Service as to whether an election may be made under section 6166 for one or more closely held business interests or whether a valid election under section 6166 to extend the time for payment has ceased to apply; such term, however, does not include a private letter ruling, technical advice memorandum, or technical expedited advice memorandum issued by the Office of Chief Counsel;

(4) any reference to a “request for a determination” refers to an election filed under section 6166(a) (and, if applicable, an election under section 6166(b)(7), (8) or (10)) or section 6166(h);

(5) any reference to a “preliminary determination letter” refers to a Letter 950 issued by the Service (also known as a 30-day letter or notice of preliminary determination) or a letter issued by the Service Center which is captioned “preliminary determination letter” and which contains a notice of Appeal rights in language similar to that in a Letter 950; and

(6) any reference to a “final determination letter” refers to a Letter 3570, *Notice of Determination As Provided in IRC § 7479 That Extension of Time for Payment Under IRC § 6166 Has Ceased To Apply*, or Letter 3571, *Notice of Determination As Provided in IRC § 7479 That Election Under IRC § 6166 Has Been Denied*, issued by the Service (each of which is also known as a 90-day letter or notice of final determination).

SECTION 3. BACKGROUND

.01 Pursuant to section 6166(a), an executor may elect to pay part or all of the estate tax in two or more (but not exceeding ten) equal installments if: (1) the decedent was a citizen or resident of the United States at the date of death; and (2) the value included in the decedent’s gross estate for either (i) an interest in a closely held business or (ii) interests in two or more closely held businesses that are treated as an interest in a single closely held business pursuant to section 6166(c), exceeds 35 percent of the adjusted gross estate. Section 6166(b) sets forth definitions and, in paragraphs (7), (8), and (10), special rules that allow an executor to make an election to pay part or all of the estate tax in installments under section 6166(a) in certain circumstances that would not otherwise qualify for the election under section 6166(a). Generally, the executor must make an election under section 6166(a) (and, if applicable, an election under section 6166(b)(7), (8) or (10)) no later than the due date for filing the estate tax return (including any extensions of time to file). *See* I.R.C. § 6166(d).

.02 Section 6166(e) provides that, if an election was made under section 6166(a) to pay any part of the estate tax in installments and a deficiency is assessed, the deficiency, subject to applicable limitations on the amount of tax deferred, generally will be prorated to the installments already paid or due prior to the date the deficiency

is assessed, as well as to the installments not yet due.

.03 After a valid section 6166 election is made, certain events may trigger the acceleration of the deferred estate tax payments. Section 6166(g) identifies events that terminate the extension of time for payment and require the payment of the unpaid portion of the estate tax upon notice and demand.

.04 Under section 6166(h), the executor of an estate may elect to pay in installments an assessed deficiency of estate tax for an estate that qualifies under section 6166(a), even though the executor did not make an election under section 6166(a). The executor must make the section 6166(h) election with respect to the deficiency no later than 60 calendar days after the Service has issued a notice and demand for the payment of that deficiency.

.05 Section 7479 provides that the Tax Court may issue a declaratory judgment in the case of an actual controversy involving a determination by the Service (or a failure of the Service to make a determination within 180 calendar days) with respect to the initial validity of a section 6166 election, or a determination by the Service with respect to the continuing validity of a section 6166 election. Under section 7479(b)(2), however, the Tax Court may not issue a declaratory judgment unless the applicant has exhausted all administrative remedies within the Service. Section 7479(b)(2) further provides that, with respect to a failure of the Service to make a determination, an applicant shall be deemed to have exhausted the applicant’s administrative remedies upon the expiration of 180 calendar days after the request for such determination was made, provided that the applicant has taken in a timely manner all reasonable steps to secure that determination.

.06 Rule 210(c) of the Tax Court Rules of Practice and Procedure provides that the Tax Court will not have jurisdiction over an action for declaratory judgment unless the Service has issued a determination letter, or the Service has been requested to make a determination and has failed to do so for a period of at least 180 calendar days after the request for such determination was made. For information relating to the filing of a petition with the Tax Court for a declaratory judgment under section 7479, see Tax Court Rule 211(f).

SECTION 4. EXHAUSTION OF ADMINISTRATIVE REMEDIES

.01 *Actions Required to be Taken.* Section 7479(b)(2) provides that the Tax Court shall not issue a declaratory judgment or decree in any section 7479 proceeding unless the applicant has exhausted all available administrative remedies within the Service. *See also* Tax Court Rule 210(c)(4). The reasonable steps required to be taken by the applicant, whether the petition is based on the Service’s determination or the Service’s failure to make a determination, are listed below. All of these steps need not be completed by the same person. The actions taken (and notices received) by the executor, as well as any actions taken (and notices received) by others, will be attributed to, and thus deemed to have been performed (or received) by, the applicant.

(1) The executor must timely file (including extensions of time to file granted by the Service) a Form 706, *United States Estate (and Generation-Skipping Transfer) Tax Return*, on behalf of the estate and attach the election to extend the time to pay pursuant to section 6166(a) (and, if applicable, an election under section 6166(b)(7), (8) or (10)). In the case of a deficiency assessed with respect to an estate for which the executor did not make a section 6166 election on the Form 706, if the executor wishes to pay the deficiency in installments, the executor must elect to extend the time to pay the deficiency pursuant to section 6166(h) by filing a notice of election with the Service within 60 calendar days after the date that notice and demand for payment of the deficiency is made.

(a) If the election is tentatively denied in whole or in part, or if the Service proposes under section 6166(g) to terminate an election, the Service will issue a preliminary determination letter to the applicant, advising the applicant of the applicant’s right to appeal the determination by requesting a conference with the Service’s Appeals Office (an “Appeals conference”).

(b) Similarly, if during the Service’s examination of the Form 706, the Service concludes that an election should have been denied, the Service will issue a preliminary determination letter to the applicant, advising the applicant of the appli-

cant's right to appeal the determination by requesting an Appeals conference.

(2) The applicant must request, in writing, an Appeals conference within 30 calendar days after the mailing date of the preliminary determination letter, or by such later date for responding to the preliminary determination letter as is agreed to between the applicant and the Service. The applicant must participate fully in an Appeals conference, including, without limitation, submitting all additional information related to the section 6166 determination (if any) that is requested by the Service in connection with (or as a follow-up to) the Appeals conference.

(a) If the applicant does not timely request an Appeals conference and fully participate in any conference that is held, the applicant will not be deemed to have exhausted all administrative remedies.

(b) Appeals conferences may be conducted by telephone, correspondence, face-to-face meetings, or by a combination of these methods.

(c) Upon reaching a final decision, Appeals will issue a final determination letter to the applicant. The determination by Appeals, regarding the estate's initial or continuing eligibility under section 6166, is final and may not be appealed further within the Service.

.02 When Remedies Deemed Exhausted. An applicant will be deemed to have exhausted all administrative remedies upon the applicant's completion of the actions in section 4.01 of this revenue procedure and the expiration of a reasonable time for the Service to issue a final determination letter subsequent to the Appeals conference. For this purpose, a reasonable time shall be deemed to have expired on the 61st calendar day after the later of the date of the Appeals conference or the date of receipt by Appeals of the applicant's submission of all additional information requested, if any.

.03 Remedies Deemed Exhausted Without Appeals Conference. An applicant who has taken all reasonable steps to secure the determination as provided in section 4.01 of this revenue procedure will be deemed to have exhausted all administrative remedies within the Service for purposes of section 7479 in the following situations:

(1) upon the issuance of a final determination letter, if the applicant did not pre-

viously receive a preliminary determination letter, provided that the failure to receive the preliminary determination letter was not due to actions or inactions of the applicant (such as a failure to supply requested information or a current mailing address to the Service);

(2) upon the expiration of 180 calendar days after the date on which the request for a determination was made, if the applicant has received neither a preliminary determination letter nor a final determination letter within that period, provided that the failure to receive any such letter was not due to actions or inactions of the applicant; or

(3) upon the expiration of a reasonable period of time that is not less than 61 calendar days after a timely request for an Appeals conference was made in response to a preliminary determination letter, during which the Service has failed to respond to the request for an Appeals conference.

SECTION 5. EXAMPLES

The following examples illustrate the exhaustion of administrative remedies requirement, but do not address any other possible jurisdictional defects.

.01 Example 1: The executor timely files a Form 706 and makes an election under section 6166(a)(1). The Service issues a preliminary determination letter, tentatively granting the election. The Service subsequently conducts an examination of the estate's Form 706, determines that the estate is not entitled to pay the tax in installments pursuant to section 6166, and sends a second preliminary determination letter to the executor denying the election. The applicant, within 30 calendar days after the mailing date of the second preliminary determination letter, submits a written request for an Appeals conference. The applicant provides all materials requested by Appeals in a timely fashion. Appeals denies the election and sends the applicant a final determination letter. Upon the issuance of the final determination letter, the applicant has exhausted all available administrative remedies within the Service.

.02 Example 2: The executor timely files a Form 706, makes elections under section 6166(a) and section 6166(b)(8), and tenders with the return the first installment payment of the tax. The executor receives evidence of the Service's receipt of the Form 706 (*i.e.*, a date-stamped receipt from hand-carrying the return in accordance with Treas. Reg. §§ 20.6091-1 or 20.6091-2, a return receipt from certified or registered mail, a certification by a private delivery service of receipt of a signature upon delivery to the Service, or a written or other subsequent acknowledgment of receipt from the Service). The applicant does not receive any correspondence from the Service relating to the request for a determination. On the 181st calendar day after the filing of the Form 706, the applicant files a petition with the Tax Court requesting a declaratory judgment pursuant to section 7479. Due to the failure

of the Service to make a determination regarding the section 6166 election within 180 calendar days after the filing of the Form 706, the applicant is deemed to have exhausted all available administrative remedies within the Service.

.03 Example 3: The executor timely files a Form 706 and makes an election under section 6166(a). After an examination of the Form 706, the Service issues a final determination letter recognizing the validity of the election. Subsequently, the Service determines that more than 50 percent of the interest in the closely held business has been disposed of during the deferral period. Pursuant to section 6166(g), the Service issues a preliminary determination letter proposing to terminate the section 6166 election. Within 30 calendar days after the mailing date of the preliminary determination letter, the applicant submits a written request for an Appeals conference. The applicant timely provides all requested information to Appeals. After considering the information provided, Appeals issues a final determination letter that the extension previously granted has ceased to apply. The applicant has exhausted all available administrative remedies within the Service.

SECTION 6. EFFECTIVE DATE

This revenue procedure is effective for all section 6166 elections filed on or after May 20, 2005. For any section 6166 election filed before May 20, 2005, an applicant may rely on section 4 of this revenue procedure to demonstrate that applicant has exhausted all administrative remedies within the Service.

DRAFTING INFORMATION

The principal author of this revenue procedure is Tracey B. Leibowitz of the Office of the Associate Chief Counsel, Procedure and Administration (Administrative Provisions and Judicial Practice Division). For further information regarding this revenue procedure, contact Ms. Leibowitz at (202) 622-4940 (not a toll-free call).