Office of Chief Counsel
Internal Revenue Service
Memorandum

Number: **20205201F**
Release Date: 12/24/2020

CC:TEGEDC:MABALW:CLothamer
POSTU-121501-18

UILC: 508.01-00, 7428.00-00, 7428.05-00, 9100.00-00

date: November 10, 2020

to: Stephen A. Martin
Director, Exempt Organizations Determinations
(Tax Exempt/ Government Entities)

from: Casey Lothamer
Area Counsel (Mid Atlantic Area Washington)
(Tax Exempt & Government Entities)

---

subject: Treas. Reg. § 301.9100-3 Relief for Applications for Exemption

This memorandum responds to your request for assistance. This advice may not be used or cited as precedent.

ISSUES

1. Under what circumstances, if any, should Exempt Organizations, Determinations (EOD) provide Treas. Reg. § 301.9100-3 relief to IRC section 501(c)(3) applicants?
2. What is the proper process for denying relief requests under § 301.9100-3? (*i.e.*, does taxpayer have section 7428 Declaratory judgment rights?)

CONCLUSIONS

1. Section 501(c)(3) organizations who are eligible to self-declare, like non-(c)(3) self-declarers, are not eligible for § 301.9100-3 relief because they did not fail to make a required regulatory election. Further, organizations that fail to file the necessary information returns holding themselves out as exempt organizations are not eligible for § 301.9100-3 relief because they would not otherwise be exempt for the period for which they are requesting relief. In addition, the Internal Revenue Service ("Service") is justified under the applicable standard of review to deny such relief on the grounds that the organizations did not act in

reasonable good faith. Finally, organizations that have filed the necessary information returns are not eligible for relief beyond the date of which the statute of limitations on assessment of tax has expired, which is typically three years after the due date of the return.

2. Denial of § 301.9100-3 relief by EOD does not separately provide a right to petition the Tax Court under section 7428 because § 301.9100-3 relief is purely a function of administrative grace, is not a justiciable controversy described in section 7428, and is reviewed under a completely separate standard than the *de novo* standard used in section 7428 actions. However, section 7428 jurisdiction over the denial of exempt status for periods prior to the postmark date of the application appears to be a matter of first impression.

FACTS

Most section 501(c)(3), (9), (17), and (29) organizations are required to apply for recognition of exemption from Federal income tax. Certain section 501(c)(3) organizations (*e.g.,* churches, small public charities with gross receipts not normally more than $5,000, and organizations formed prior to October 10, 1969) and most other exempt organizations are eligible to self-declare their exemption from Federal income tax.

Section 501(c)(3) organizations that are required to file an application for exemption and do so within 27-months of the date of formation[1] are recognized as exempt from the date of formation in accordance with long standing regulations ("27-month rule.") Section 501(c)(3) organizations that are required to file an application for exemption, but do not file such application within 27 months of formation, generally are recognized as exempt from the postmark date of the application pursuant to section 508(a). However, these organizations have the option to request § 301.9100-3 relief by filing Schedule E to Form 1023, Application for Recognition of Exemption Under Section 501(c)(3) of the Internal Revenue Code, requesting relief from the 27-month requirement. That is, they can request an exemption date that would otherwise be precluded under the 27-month rule.

We understand that many applicants requesting relief from the 27-month rule have not filed the required information returns for years before their applications for exemption. Prior to the Pension Protection Act of 2006, EOD generally granted requests for relief from the 27-month rule under § 301.9100-3. Most requests were granted without much development or review. After the implementation of the Pension Protection Act of 2006, granting relief raised additional questions because granting relief (recognizing an earlier effective date of exemption) could result in the organization being automatically revoked under section 6033(j) prior to the application date (as

[1] For purposes of section 508(a), the operative date is the date organized, which is the date that the organization becomes described in section 501(c)(3) (without regard to section 508(a)). Treas Reg. § 1.508-1(a)(2)(iii). The date organized is usually the date of formation.

discussed below) for those organizations that failed to file the required information returns, even if they otherwise qualified for exemption.

LAW AND ANALYSIS

I. § 9100-3 Relief Standards for 501(c)(3) Applicants

By regulations under section 508, an organization applying for exempt status as a section 501(c)(3) organization must generally apply within 15 months from the end of the month in which it was formed. Treasury Regulation § 301.9100-2 provides an automatic 12-month extension in which to apply for exemption and be recognized back to formation date. These provisions taken together provide a total of 27 months in which to apply for recognition from the date of formation as a section 501(c)(3) organization. Section 301.9100-3(a) provides for other extensions of regulatory elections beyond the 27-month extension if the taxpayer acted reasonably and in good faith and the grant of relief will not prejudice the interests of the government. A regulatory election means an election whose due date is prescribed by regulation or IRB guidance. Self-declarers are eligible for exemption regardless of whether they apply.

Churches, and other section 501(c)(3) organizations not required to file a Form 1023, have historically been recognized by the Service as exempt from formation date unless something in the file indicated that the organization did not meet the requirements for exemption prior to the application for recognition of exemption. Section 501(c)(3) self-declarers, like non-(c)(3) self-declarers, are not eligible for § 301.9100-3 relief because they didn't fail to make a required regulatory election. That is, there is no due date for such organizations prescribed by regulation or IRB guidance. Thus, unless such organizations apply within 27 months of formation, they should be recognized as exempt as of the postmark date pursuant to Rev. Proc. 2020-5, section 6.08, or its successor. Such organizations may qualify under section 501(c)(3) prior to the application date but the Service does not recognize exemption for such prior periods.

In analyzing the proper application of § 301.9100-3(a) to applications for recognition of exemption under section 501(c)(3), we note key policy behind section 9100 relief as outlined in the preamble to the final regulations—

> There are two policies that must be balanced in formulating the standards for § 301.9100 relief. The first is the policy of promoting efficient tax administration by providing limited time periods for taxpayers to choose among alternative tax treatments and encouraging prompt tax reporting. The second is the policy of permitting taxpayers that are in reasonable compliance with the tax laws to minimize their tax liability by collecting from them only the amount of tax they would have paid if they had been fully informed and well advised. [T.D. 8742, 1998–1 C.B. 388, 389.11]

Furthermore, as also made clear in the preamble to the final § 301.9100-3 regulations, an applicant must be eligible to make the election to qualify for relief in the timing to make the election:

> The commentator suggested that a request for extension of time to make an election should not be denied on the basis that the taxpayer fails to qualify for the underlying election. The commentator noted that the regulations provide that the granting of § 301.9100 relief is not a determination that the taxpayer is otherwise eligible to make the election. This suggested modification has not been adopted. The IRS and the Treasury Department believe it is in the interest of sound tax administration to deny § 301.9100 relief when it becomes apparent in considering the request for an extension of time that the taxpayer is not otherwise eligible to make the election. This ensures that the resources of the IRS are brought to bear in the resolution of the issue regarding eligibility at the earliest stage of the administrative process. [TD 8742 (62 F.R. No. 250, Dec. 31, 1997, p. 68168).]

As such, the organization must otherwise qualify for exemption for all periods prior to the application for relief from the 27-month rule. These organizations will not satisfy that requirement.

Under section 6033, an organization exempt from tax under section 501 must file the required information returns. Specifically, Treas Reg. § 1.6033-2(c) requires "[a]n organization *claiming an exempt status under section 501(a)* … file a return required by this section in accordance with the instructions applicable thereto." (Emphasis added.) Section 6033(j) provides that if an organization claiming to be exempt from tax under section 501(a) fails to file the required returns for three consecutive years it is revoked by operation of law. Accordingly, organizations that have not filed returns for three consecutive years would be simultaneously and automatically revoked if 9100 relief were granted and the organization were recognized as exempt retroactive to the date of their formation.

While section 6033(j)(2) permits auto-revoked organizations to apply for reinstatement of exempt status and section 6033(j)(3) permits retroactive reinstatement if "an organization…can show to the satisfaction of the Secretary evidence of reasonable cause" for the failure to file the returns for three consecutive years, such reinstatement is "in the discretion of the Secretary." Under the authority of section 6033(j)(3), the Service provided standards and procedures for reinstatement in Rev. Proc. 2014-11; however, none of the sections providing for retroactive reinstatement would apply to organizations that have never filed information returns under section 6033 since their formation nor otherwise put the Service on notice of their existence and

claim of exempt status.[2] Accordingly, at most organizations applying for exempt status after more than three years of not filing required information returns would be simultaneously auto-revoked upon receiving retroactive recognition of exempt status and would not be eligible for reinstatement on a retroactive basis. Consistent with the interests of sound tax administration as explained in the preamble to the final regulations, the Service should not grant relief in making the election to file for retroactive exempt status if such exempt status would not be available for such prior periods due to auto-revocation.

In addition, we also note that an organization that has failed to file information returns while claiming exempt status in accordance with section 6033 and the regulations thereunder, may not be able to establish that it meets the operational requirement for exempt status. See Rev. Rul. 59-95, 1959-1 C.B. 627 (The failure to file such information return "may result in the termination of the exempt status of an organization previously held exempt, on the grounds that the organization has not established that it is observing the conditions required for the continuation of an exempt status.") Accordingly, the Service is justified in denying 9100 relief it if determines that it would not be in the interest of sound tax administration to grant 9100 relief for a late filed application for recognition of exempt status back to the date of formation if the organization's failure to file returns during such period indicates that it would not be able to demonstrate that it meets the operational requirement for exempt status.

In addition to the fundamental principle that section 9100 relief should not be granted on the basis of sound tax administration if the organization would not otherwise qualify for exempt status for the period for which it is requesting 9100 relief for the late election, the Service should also deny 9100 relief if organization does not clearly meet the requirements that it (1) acted reasonably and in good faith and (2) the grant of relief will not prejudice the interests of the government.

a. Acted Reasonably and in Good Faith

A taxpayer will be deemed to have acted reasonably and in good faith if the taxpayer:

> (i) Requests relief under this Section before the failure to make the regulatory election is discovered by the Internal Revenue Service (Service);
>
> (ii) Failed to make the election because of intervening events beyond the taxpayer's control;

[2]Each section that provides retroactive reinstatement (sections 4, 5 and 6) by its terms requires notification to the taxpayer or the public. Neither notification to the organization nor the public occurs if the organization has never filed returns required under section 6033 or otherwise put the Service on notice of their existence as an organization claiming exempt status. Accordingly, an organization that has never filed returns or otherwise put the Service on notice that it is claiming exempt status will not have received notification of its auto-revocation, assuming it was even exempt in the first place; therefore, such organizations would only be eligible to apply for reinstatement as of the postmark date of such application for reinstatement under section 7.

> (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 (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. Section 301.9100-3(b)(i)-(v)

The organization seeking 9100 relief must demonstrate to the satisfaction of the Service that is meets all the requirements for such relief. The Service should not assume a taxpayer meets the acted reasonably and in good faith requirement. These standards (i.e., § 301.9100-3(b)(i)-(v)) are standards of general applicability meant for requests for relief from various regulatory election requirements, such as change of accounting method requirements. Since these standards were not tailored to requests for relief from the 27-month rule,[3] they should be applied in a manner consistent with sound tax administration in the context of an application for relief from the 27-month rule.

Section 301.9100-3(b)(iii)-(v) are generally self-explanatory in that a taxpayer will have acted reasonably and in good faith if it can establish that it exercised due diligence, either by its own merit or in reasonable reliance on a knowledgeable tax professional, when it failed to file timely application for exemption. Section 301.9100-3(b)(ii) is a facts and circumstances requirement and can be established by proving it was not the taxpayer's actions that led to the failure to file a timely application for exemption. For instance, if the taxpayer hires a tax professional to complete and file the Form 1023 and the tax professional never, in fact, files the Form.

Section 301.9100-3(b)(i) is less clear in its application when considering an organization requesting 9100 relief for its failure to timely file an application for recognition of exemption retroactive to its date of formation. On its face it seems to imply that a taxpayer will have acted reasonably and in good faith so long as the application for relief from the 27-month rule is received by the Service before the Service audits, or otherwise determines, an organization's exemption from tax. This requirement makes sense in the context of an applicant that has held themselves out as exempt by filing the required information returns. However, it would be relatively impossible for the Service to audit, or otherwise determine, an organization's exemption from tax if the organization never filed an information return holding themselves out as exempt. Therefore, consistent with the consideration of sound tax administration noted

[3] We note that § 301.9100-1(d)(2) permits exceptions from 9100 relief or the provision of alternative relief through a revenue ruling, revenue procedure, notice, or announcement published in the Internal Revenue Bulletin.

in the preamble to the final regulations and in light of the unique nature of certain tax-exempt organizations' requirements to both obtain recognition of exempt status from the Service under section 508(a) and file annual information returns under section 6033 while claiming such status, the application of this standard under § 301.9100-3(b)(i) should be construed to apply only to organizations that file the required information returns, thereby putting the Service on notice that they are holding themselves out as exempt and giving the Service an opportunity to discover the failure to make the regulatory election. To read this factor otherwise would eviscerate the requirement that an organization apply for exemption within 27 months, and result in automatic 9100 relief to any and all organizations that had filed no returns (and more favorable treatment than organizations that did file returns, as discussed below).

Our research indicates that there has been scant litigation reviewing how the regulations under § 301.9100-3 have been applied with respect to exemption applications. In one case, however, Codington County Humane Society, T.C. Memo. 1991-186 ("petitioner" or "Codington"), the Tax Court considered whether the Commissioner abused his discretion in denying the petitioner's application for an extension of time to file an amended application in which it sought retroactive recognition as a tax-exempt organization under Section 501(c)(3), from August 15, 1977 (formation date), to August 3, 1988, the effective date of the Commissioner's recognition of such tax-exempt status. At that time petitioner sought relief under § 1.9100-1 for its failure to act timely. These regulations were the predecessor of what is now § 301.9100-3. The basic requirements were similar in that they provided that "the Commissioner in his discretion may, upon good cause shown, grant a reasonable extension of the time fixed by the regulations in this chapter for making an election or application for relief in respect of tax under subtitle A," and "it is shown to the satisfaction of the Commissioner that the granting of the extension will not prejudice the interests of the government." It is important to remember that the case was not applying the current specific standards in § 301.9100-3 and that it is a nonbinding Tax Court Memorandum. However, since the case considered the issue of the grant of 9100 relief to an organization that applied for retroactive recognition of exemption, and since there was nothing in the preamble to either the proposed or final regulations indicating an intent to change the result in this case, the case remains instructive in how the Tax Court might apply the standard in the final regs, including the broad language in (i) related to the "discovery" by the Service, to very similar facts.

The facts of that case show that the board of directors intended for the organization to seek tax-exempt status, but the matter "fell through the cracks" as one of the board members, Mr. Manson, an attorney who had done the legal work for the organization, moved away. In late November 1980, petitioner's officers and board of directors first became aware that the Service had no record of granting petitioner tax-exempt status under section 501(c)(3). At its board of directors' meeting in February 1981 the board voted to take action to straighten out petitioner's tax-exempt status. Following this meeting, the petitioner's board contacted Mason and reported at the March 1981 board meeting, that Manson had agreed to take care of the necessary filings. Subsequently, in the summer of 1981, a number of the original board of

directors resigned. On or about September 2, 1982, petitioner filed Forms 990, Return of Organization Exempt from Income Tax, for the periods July 1, 1980, through June 30, 1981 and July 1, 1981 through June 30, 1982. On the returns, petitioner attached the Schedule A entitled "Organization Exempt under Section 501(c)(3)." Thereafter, substantial gifts were made to petitioner by Olga Olsen who also included petitioner in her will; Ms. Olsen died in 1987. In the spring of 1988 when the inheritance tax report for her estate was being prepared, petitioner's then current officers learned that petitioner still did not have a determination as to its tax-exempt status under section 501(c)(3).

According to the Tax Court's opinion, on August 3, 1988, Codington filed its Form 1023 application. The Commissioner responded on October 5, 1988, that recognition under section 501(c)(3) would be effective only from and after that filing date. Petitioner immediately filed a Form 1023 seeking exemption under section 501(c)(3) for the prior period. On October 20, 1988, The Commissioner determined that petitioner Codington would be treated as a tax-exempt organization under section 501(c)(3), effective August 3, 1988, and treated as a section 501(c)(4) organization for the period of August 15, 1977 to August 3, 1988. Thereafter, on January 30, 1989, petitioner filed an application seeking an extension of time under § 1.9100-1 of the Income Tax Regulations [now § 301.9100-3 of the Admin. & Proced. Regs.], together with an amended Form 1023, requesting a retroactive determination of exempt status under section 501(c)(3) from the date of its incorporation.

The Tax Court was not persuaded that the Commissioner had abused his discretion. It pointed out that despite Codington's awareness in November 1980, two years after the deadline for making a timely application, that the Commissioner had no record of granting tax-exempt status, it waited almost eight additional years before filing its Form 1023. Further, the Tax Court criticized Codington for its sporadic efforts to elicit information from its attorney, Mr. Manson, as to what he was doing. The court noted that there was no evidence showing why he did not timely take steps to obtain tax-exempt status under section 501(c)(3) for petitioner. The court also noted that about half a year transpired from the date of the initial application on Form 1023 and more than 3 months passed from the date of the Commissioner's determination before petitioner made its application for an extension of time to file an amended application seeking retroactive recognition of exemption under section 501(c)(3). The filing of the Forms 990 over 5 years after the petitioner was organized led the court to conclude that petitioner had an indifferent attitude towards meeting its obligations as a tax-exempt organization.

Although Codington's principal argument was that it had relied on Mr. Manson as its attorney charged with the responsibility to do what was necessary to obtain tax-exempt status, the Tax Court found that such reliance, particularly without adequate follow-up, was simply not enough. The court held that based on the facts in the administrative record, petitioner did not carry its burden of proving that the Commissioner had abused his discretion in denying the application for extension of time for filing an amended application for exemption. Therefore, the petitioner was not

entitled to retroactive recognition as being tax-exempt under section 501(c)(3). The court did not consider whether granting relief would be prejudicial to the government because petitioner Codington failed to meet the first prong of the test.

Accordingly, based on the most reasonable view of the application of the standard in § 301.9100-3(b) to a request for relief related to a late application for retroactive recognition of exemption--taking into account the interests of sound tax administration and in light of the result in the Codington case that was not expressly undone by the final regulations--we believe the Service is justified in a view that an organization's failure to file necessary information returns since formation largely prevents the Service from discovering its failure to apply for recognition as required by section 508 and therefore the organization has not met the standard in for acting reasonably and in good faith under § 301.9100-3(b)(i).

b. Prejudice to the Interests of Government

Regarding the requirement that granting relief does not prejudice the interest of government, the regulations provide that granting an election will prejudice the interests of the government if:

> (i) Lower tax liability. 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 (taking into account the time value of money). Similarly, if the tax consequences of more than one taxpayer are affected by the election, the Government's interests are prejudiced if extending the time for making the election may result in the affected taxpayers, in the aggregate, having a lower tax liability than if the election had been timely made.
>
> (ii) Closed years. 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 Section 6501(a) before the taxpayer's receipt of a ruling granting relief under this Section. The Service may condition a grant of relief on the taxpayer providing the Service with a statement from an independent auditor (other than an auditor providing an affidavit pursuant to paragraph (e)(3) of this Section) certifying that the interests of the Government are not prejudiced under the standards set forth in paragraph (c)(1)(i) of this Section.

Two cases of note in the Tax Court have interpreted the prejudice to the government requirement. In Vines v. Commissioner, 126 T.C. 279, 289 (2006), the Tax Court wrote:

> We begin our analysis of Section 301.9100–3(c), Proced. & Admin. Regs., keeping in mind the following policies stated by the Secretary in the preamble to the final regulations:
>
> > There are two policies that must be balanced in formulating the standards for § 301.9100 relief. The first is the policy of promoting efficient tax administration by providing limited time periods for taxpayers to choose among alternative tax treatments and encouraging prompt tax reporting. The second is the policy of permitting taxpayers that are in reasonable compliance with the tax laws to minimize their tax liability by collecting from them only the amount of tax they would have paid if they had been fully informed and well advised. [T.D. 8742, 1998–1 C.B. 388, 389.11]

The case of Mezrah v. Commissioner, T.C. Memo. 2008-123, illustrated the application of § 301.9100-3(c)(1)(i) (lower tax liability) wherein the Tax Court cited to the rationale for the Service's denial of relief:

> In this case, the government would be prejudiced under Section 301.9100–3(c)(1)(i) if we were to grant relief to file a late election because you would have a lower tax liability in the aggregate for all years affected by the election than you would have had if the election had been made timely. You filed returns for taxable year 1995 and all subsequent years taking depreciation deductions on property, the basis of which should have been exhausted had you timely made a Section 108(c)(3)(C) election. Taxable years 1995–2000 are now closed. Granting relief would permit you to exclude cancellation of indebtedness income in 1994. However, due to the expiration of the period of limitations the Service cannot reduce or eliminate the depreciation deductions taken in Years 1995–2000. Thus, you would have a lower tax liability in the aggregate for all taxable years affected by the election than if you had made a timely election.

In Mezrah, it was determined that the interests of the government would be prejudiced because petitioner's depreciation deductions for the closed years (taxable years 1995-2000) were higher than they would have been if it had made a timely election and reduced its basis as required by section 108(c)(1). Therefore, petitioner didn't qualify for relief under § 301.9100-3(c)(1)(ii).

Based on the court precedence and regulations, the Service should compare two things when determining prejudice to the government:

1) the aggregate liability if the organization had filed its Form 1023 on time, with
2) the aggregate tax liability if the relief is granted.

The Service should not be comparing:

1) the aggregate liability if the organization had not been tax-exempt, with
2) the aggregate tax liability if the relief is granted.

Under this standard, granting relief to an applicant for exemption will rarely, if ever, 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. However, the government's interest ordinarily will be prejudiced if the statute of limitations for a period prior to the application has expired. As such, you should ordinarily deny § 301.9100-3 relief to organizations that have filed information or tax returns more than 3 years prior to the taxpayer's receipt of a determination letter granting relief, per § 301.9100-3(c)(1)(ii).

II. § 7428 and Denial of § 301.9100-3 Relief

Section 7428 provides jurisdiction for the Tax Court, Court of Federal Claims, or the District Court for the District of Columbia to issue a declaration in matters involving an actual controversy as to, among other things, the determination of the Secretary with respect to the initial qualification or continuing qualification of an organization as an organization described in section 501(c)(3) that is exempt from tax under section 501(a). In deciding whether plaintiff is entitled to declaratory judgment, the determination made by the Service is reviewed *de novo* by the court in both initial classification and revocation cases. Asmark Institute Inc., v. Comm'r, TC Memo 2011-21; The New Dynamics Found. v. United States, 70 Fed. Cl. 782 (2006); Church of Gospel Ministry, Inc. v. United States, 640 F. Supp. 96 (D.C. Dist. Ct. 1986). Section 301.9100-3 determinations, when reviewed by a court, are reviewed under a clear error standard. In addition, with the exception of the possible case mentioned below, we have not been able to find any cases in which a court had jurisdiction to review a § 301.9100-3 determination where there was not an underlying issue which gave the court jurisdiction, such as a refund claim. Given that § 301.9100-3 relief is purely a function of administrative grace, is not a justiciable controversy described in section 7428, and is reviewed under a completely separate standard than section 7428 actions, we believe that the court does not have jurisdiction to review § 301.9100-3 relief decisions absent some other controversy giving rise to judicial jurisdiction. Although the denial of § 301.9100-3 relief in this situation means the Service will not recognize the organization's exempt status prior to the postmark date of the application in accordance with longstanding deadlines under section 508 and § 301.9100-2 for submitting the application, this denial of relief and resulting lack of recognition of exempt status for prior taxable years should not be viewed as a controversy giving rise to judicial jurisdiction.[4]

The Codington case was the only case we were able to find where a court reviewed a § 301.9100 relief determination with respect to exemption without

[4] Similarly, a grant of an extension of time under § 301.9100-1(a) is not a determination that the taxpayer is otherwise eligible to make the election (i.e., that the late-filing Form 1023 applicant qualifies for retroactive exemption).

mentioning an underlying jurisdictional issue which gave rise to the litigation. There is no discussion in the opinion of how petitioner obtained its "ticket to Tax Court" for a declaratory judgment action under section 7428 which also requires the filing of a petition within 90 days following receipt of an adverse determination. Our office obtained a copy of the government's brief in that case, however, which states the January 30, 1989 filing of the amended Form 1023 was accompanied by a document entitled "Application Seeking an Extension of Time for Filing an Amended Form 1023 Seeking Recognition of Exempt Status under Section 501(c)(3)." In response to those filings, the Commissioner issued a determination letter on June 9, 1989 recognizing Codington as a section 501(c)(3) organization effective August 3, 1988, and a section 501(c)(4) organization for the prior period. The determination letter also denied petitioner's application for extension of the time period for filing the Form 1023. The letter stated that the letter issued dated October 20, 1988, remained in effect. Presumably Codington petitioned timely from that June 9, 1989 determination letter. Regardless, there is no record in the Court's docket that we argued that the court did not have jurisdiction to entertain § 301.9100 relief. Accordingly, it appears to be an issue of first impression whether the Tax Court would deny a motion to dismiss on grounds that it lacks jurisdiction under section 7428 if an organization files a petition under section 7428 regarding the denial of § 301.9100-3 relief for a late filed application for recognition of exemption.

HAZARDS

[redacted]

Please call [redacted] if you have any further questions.

/s/
Casey Lothamer
Area Counsel (Mid Atlantic Area Washington)
(Tax Exempt & Government Entities)