

**Internal Revenue Service**

Department of the Treasury  
Washington, DC 20224

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LEGEND:

Taxpayer =  
Tax Return Preparer =  
Year 1 =  
Year 2 =  
Year 3 =  
\$a =  
\$b =  
\$c =  
\$d =

Dear :

This responds to your letter dated July 20, 2009, requesting an extension of time under sections 301.9100-1 and -301.9100-3 of the Procedure and Administration Regulations for you to make a late election to treat qualified dividend income and net capital gains as investment income pursuant to sections 163(d)(1) and 163(d)(4)(B) of the Internal Revenue Code (the Code) for Year 1 and Year 2.

**FACTS**

Taxpayer is an individual taxpayer. On her federal income tax return for Year 1, Taxpayer reported qualified dividends in the amount of \$a and capital gains in the amount of \$b. On her federal income tax return for Year 2, Taxpayer reported qualified dividends in the amount of \$c and capital gains in the amount of \$d.

To prepare those federal income tax returns for the Year 1 and Year 2 taxable years, Taxpayer engaged Tax Return Preparer and relied on Tax Return Preparer's

experience and background with respect to all tax matters. Tax Return Preparer was not aware of the election that can be made under section 163(d)(4)(B) of the Code to consider some or all of qualified dividends and net capital gains as investment income for purposes of computing the allowable investment interest deduction. As a result, such an election was not made on Taxpayer's tax returns for Year 1 and Year 2. Taxpayer was not aware of the implications of this election until her tax preparer called this matter to her attention in Year 3.

## LAW

Section 163(d)(1) of the Code 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) of the Code 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 by only 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.

Such term shall include qualified dividend income (as defined in section 1(h)(11)(B)) only to the extent the taxpayer elects to treat such income as investment income for purposes of this subsection.

Section 1.163(d)-1(b) of the Income Tax Regulations provides that the election for net capital gain and qualified dividend income 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 or the qualified dividend income is received.

Sections 301.9100-1 through 301.9100-3 of the Procedure and Administration Regulations provide the standards the Commissioner uses to determine whether to grant an extension of time to make a regulatory election. For this purpose, 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 section 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 section 6662 at the time the taxpayer requests relief and the new position requires a regulatory election for which relief is requested;

(ii) was informed in all material respects 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 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.

## ANALYSIS

In the present situation, the requirements of sections 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations have been satisfied. Taxpayer's election is a regulatory election, as defined under section 301.9100-1(b), because the due date of the election is prescribed in the Income Tax Regulations under section 1.163(d)-1(b). The information and representations made by Taxpayer establish that Taxpayer acted reasonably and in good faith with this request. Taxpayer requested relief before the failure to make the regulatory election is discovered by the Service. Taxpayer reasonably relied on a qualified tax professional and that tax professional failed to make or advise Taxpayer to make an election under section 163(d)(4)(B). These facts indicate Taxpayer acted reasonably and in good faith.

Further, based on the facts provided, the interests of the Government will not be prejudiced by granting relief in this case. Taxpayer will not have a lower tax liability in the aggregate for the Year 1 and Year 2 taxable years affected by the election if given permission to make the election at this time than Taxpayer would have had if the election had been timely made. In addition, the Year 1 and Year 2 taxable years in which the regulatory election should have been made and any taxable years that would have been affected by the election had it been timely made, will not be closed by the period of limitations on assessment under section 6501(a) before Taxpayer's receipt of the ruling granting an extension of time to make a late election.

## RULING

Because she acted reasonably and in good faith and granting relief will not prejudice the interests of the Government, Taxpayer has met the requirements for an extension under § 301.9100-3 for making the § 163(d)(4)(B) election for the Year 1 and Year 2 taxable years. Accordingly, Taxpayer is granted an extension of time for making the election until 60 days from the date of this ruling. The election should be made by filing a Form

4952, "Investment Interest Expense Deduction," and by including a copy of this ruling letter with amended returns for Year 1 and Year 2.

#### CAVEATS

The above extension of time for making the election is conditioned on the receipt of the section 6501(c)(4) consent form signed by Taxpayer to extend the period of limitations on assessment under section 6501(a) by one year for the Year 1 taxable year.

The rulings contained in this letter are based upon information and representations submitted by Taxpayer and accompanied by a penalty of perjury statement executed by the appropriate parties. While this office has not verified any of the material submitted in support of the request for rulings, it is subject to verification on examination.

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

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

Enclosed is a copy of the letter ruling showing the deletions proposed to be made in the letter when it is disclosed under § 6110 of the Code.

Sincerely,

Christopher F. Kane  
Branch Chief, Branch 3  
Office of Associate Chief Counsel  
(Income Tax & Accounting)

Enclosure (1)

cc: