Internal Revenue Service

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Person To Contact:
        , ID No.

Telephone Number:

Refer Reply To:
CC:FIP:B03
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Date:
July 28, 2010

Legend:

Taxpayer   =

Spouse   =

Date 1   =

Date 2   =

Date 3   =

Year 1   =

Year 2   =

a   =

b   =

c   =

d   =

e   =

Accountant   =

Dear   :

This is in response to a letter submitted by your authorized representative, requesting an extension of time under section 301.9100-3 of the Procedure and Administration Regulations for you to make an election under section 475(f) of the Internal Revenue Code to use the mark-to-market method of accounting beginning with the taxable year ending December 31, Year 1. The letter was filed on Date 3.

FACTS

Taxpayer uses a calendar year in preparing his federal income tax returns and uses the cash receipts and disbursements method of accounting. Taxpayer filed a joint federal income tax return with Spouse. After a number of years working in the capital markets primarily as a seller of fixed income products, Taxpayer determined in Year 1 to engage in his own trade or business buying and selling securities for his own account. By the end of Year 1, Taxpayer had completed approximately $\underline{a}$ trades with a total transaction value of over $\underline{b}$.

Taxpayer relies almost exclusively upon Accountant, a Certified Public Accountant, for tax advice.   Taxpayer does not regularly engage in tax conversations with Accountant, but instead will speak to him on occasion. Consequently, when Taxpayer began his new trading business he did not discuss or address tax related issues with Accountant and Accountant was unaware that Taxpayer had begun trading. From February through November of Year 1 Taxpayer recognized more than $\underline{c}$ in losses. In November of Year 1, Accountant first learned of Taxpayer's business as a trader in securities. In December of Year 1 Taxpayer represents that Accountant first informed him of the availability of a section 475(f) election. At that time Taxpayer's portfolio had been largely liquidated, but December Year 1 trading resulted in approximately $\underline{d}$ net gains.

On Date 2, Taxpayer filed a request for extension of time for filing his Year 1 return and a timely election under section 475(f) to mark-to-market his securities to be effective for Year 2. On Date 3 Taxpayer filed his Year 1 return using the mark-to-market method of accounting, along with a Form 3115 for the taxable year ending December 31, Year 1.

Taxpayer engaged in securities trading activity regularly and continuously over the course of Year 1, including not only the period of time from Date 1 when his election was due until the time he became aware of the existence of an election under section 475(f), but also the period of time after he became aware of the existence of an election under section 475(f).

LAW AND ANALYSIS

Section 475(f) provides that a taxpayer engaged in a trade or business as a trader in securities may elect to apply the mark-to-market method of accounting to securities held in connection with such trade or business. *See* section 475(f)(1). Section 7805(d) provides that, except to the extent otherwise provided by the Code, any election shall be made at such time and in such manner as the Secretary shall prescribe.

On February 16, 1999, the Service published Rev. Proc. 99-17, 1999-1 C.B. 503, (section 6 superseded by Rev. Proc. 99-49, 1999-2 C.B. 725, which was clarified, modified, amplified, and superseded by Rev. Proc. 2002-9, 2002-1 C.B. 327, which was clarified, modified, amplified, and superseded by Rev. Proc. 2008-52, 2008-2 C.B. 587, which was clarified, modified, and amplified by Rev. Proc. 2009-39, 2009-38 I.R.B. 371). Rev. Proc. 99-17 provides the exclusive procedure for traders in securities to make an election to use the mark-to-market method of accounting under section 475(f). Section 5.03(1) of Rev. Proc. 99-17 provides, in relevant part, that taxpayers (other than a taxpayer for which no federal income tax return was required to be filed for the taxable year immediately preceding the election year) make an election under section 475(f) for a tax year beginning on or after January 1, 1999, by filing a statement no later than the due date (without regard to extensions) of the original federal income tax return for the taxable year immediately preceding the election year. The statement must be attached to either that return or to a request for an extension of time to file that return. Section 5.03 of Rev. Proc. 99-17. The statement must describe the election being made, the first taxable year for which the election is effective, and the trade or business for which the election is made. Section 5.04 of Rev. Proc. 99-17.

Section 301.9100-1(c) provides, in part, that the Commissioner has discretion to grant a reasonable extension of time to make a regulatory election (defined in § 301.9100-1(b) as an election whose due date is prescribed by regulations published in the Federal Register, or by a revenue ruling, revenue procedure, notice, or announcement published in the Internal Revenue Bulletin), or a statutory election (but no more than 6 months except in the case of a taxpayer who is abroad), under all subtitles of the Code except subtitles E, G, H, and I.

Sections 301.9100-3(a) through (c)(1)(ii) set forth rules that the Service generally will use to determine whether, under the facts and circumstances of each situation, the Commissioner will grant an extension of time for regulatory elections that do not meet the requirements of § 301.9100-2. Generally, a taxpayer must demonstrate that the taxpayer acted reasonably and in good faith, and the granting of relief will not prejudice the interests of the Government. Section 301.9100-3(b) provides that subject to

paragraphs (b)(3)(i) through (iii) of § 301.9100-3, when a taxpayer applies for relief under this section before the failure to make the regulatory election is discovered by the Service, the taxpayer will be deemed to have acted reasonably and in good faith; and § 301.9100-3(c) provides that the interests of the Government are prejudiced if granting relief would result in the taxpayer having a lower tax liability in the aggregate for all years to which the regulatory election applies 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(b)(3) provides, in part, that a taxpayer is deemed to have not acted reasonably and in good faith if the taxpayer uses hindsight in requesting relief. If specific facts have changed since the due date for making the election that make the election advantageous to the taxpayer, the Service will not ordinarily grant relief. In such a case, the Service will grant relief only when the taxpayer provides strong proof that the taxpayer's decision to seek relief did not involve hindsight.

Section 301.9100-3(c)(2) provides special rules for accounting method regulatory elections. These rules are mandatory and are in addition to the requirements provided in § 301.9100-3(b). This section provides, in relevant part, that the interests of the Government are deemed to be prejudiced by granting an extension of time, except in unusual and compelling circumstances, if the accounting method regulatory election is subject to the procedure described in § 1.446-1(e)(3)(i) (requiring the advance written consent of the Commissioner) or if the accounting method regulatory election for which relief is requested requires an adjustment under section 481(a) (or would require an adjustment under section 481(a) if the taxpayer changed to the method of accounting for which relief is requested in a taxable year subsequent to the taxable year the election should have been made).

Section 4 of Rev. Proc. 99-17 states that the election under section 475(f) determines the method of accounting an electing trader is required to use for federal income tax purposes for securities subject to the election. Because the election is integrally related to the change in accounting method to mark-to-market, it is an accounting method regulatory election subject to § 301.9100-3(c)(2).

Rev. Proc. 2008-52 provides procedures by which a taxpayer may obtain automatic consent to change to the mark-to-market accounting method. However, the automatic change applies to a taxpayer only if the taxpayer has made a valid election under section 475(f) and is required to change its method of accounting to comply with the election. Section 23.01 of the Appendix to Rev. Proc. 2008-52.

Taxpayer requests an extension of time to make an accounting method regulatory election that is subject to the provisions of § 301.9100-3. Relief under this section of the regulations will only be granted when a taxpayer provides evidence satisfactory to the Commissioner that the taxpayer acted reasonably and in good faith, and the granting of relief will not prejudice the interests of the Government. If specific

facts have changed since the due date for making the election that make the election advantageous to the taxpayer, the Taxpayer is deemed to have not acted reasonably and in good faith. Under such circumstances § 301.9100-3(b)(3) provides that the Service will grant relief only when the taxpayer provides strong proof that the taxpayer's decision to seek relief did not involve hindsight.   Without such proof the taxpayer is deemed to have not acted reasonable or in good faith.

In this case, Taxpayer did not file his request for relief until Date 3. The election was due by Date 1. The late filing provides Taxpayer the benefit of e months of hindsight to review and consider the results of his securities trading transactions and whether he would benefit by making the election. Specifically, had Taxpayer made a timely election he would not have had the benefit of knowing the results of his security transactions after the election's due date and he would not have had this time to act on that knowledge. Therefore, Taxpayer has failed to demonstrate his decision to seek relief did not involve hindsight, and in accordance with section 301.9100-3(b)(3), Taxpayer is deemed to have not acted reasonably or in good faith.

Based on the facts and representations submitted, we conclude that Taxpayer has not satisfied the requirements for our granting a reasonable extension of time to make an election under section 475(f) to use the mark-to-market method of accounting. Specifically, Taxpayer has failed to demonstrate he acted reasonably and in good faith.

CONCLUSION

Taxpayer's request for an extension of time to make the section 475(f) election for the tax year ending December 31, Year 1 is denied. Because Taxpayer's request for relief is denied pursuant to section 301.9100-3(b), for lack of reasonable action and good faith, we will not consider other reasons why relief may have been denied.

Because we have determined that Taxpayer is deemed not to have acted reasonably or in good faith, it was not necessary for us to consider the additional requirements for relief imposed by § 301.9100-3(c)(2) when a method change is involved. Specifically, we did not consider if unusual and compelling circumstances existed. As a result, even if Taxpayer had demonstrated reasonableness and good faith, he still must show unusual and compelling circumstances.

In addition, we have not considered, and therefore express no opinion, whether Taxpayer qualifies as a trader in securities within the meaning of section 475(f).

No opinion is expressed as to the tax treatment of the transaction under the provisions of any other sections of the Code and regulations, which may be applicable thereto.

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

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to your authorized representative.

Sincerely yours,

Robert B. Williams
Robert B. Williams
Senior Counsel, Branch 3
Office of Associate Chief Counsel
(Financial Institutions & Products)