Internal Revenue Service

Number: **202009013**
Release Date: 2/28/2020

Index Number: 475.08-00, 9100.00-00, 9100.10-01

Department of the Treasury
Washington, DC 20224

Third Party Communication: None
Date of Communication: Not Applicable

Person To Contact:
, ID No.
Telephone Number:

Refer Reply To:
CC:FIP:B03
PLR-111852-19
Date:
November 15, 2019

Legend

Taxpayers:

Husband:

Wife:

Partnership:

Year 1:

Year 2:

Year 3:

Month 1:

Month 2:

Date 1:

Date 2:

Date 3:

Date 4:

Date 5:

Date 6:

a:

b:

c:

d:

e:

Dear :

This letter responds to a request for a private letter ruling that Taxpayers filed with the Internal Revenue Service. Taxpayers' letter, and subsequent submissions, requested an extension of time under § 301.9100 of the Procedure and Administration Regulations to make an election to use the mark-to-market method of accounting under § 475(f)(1) of the Internal Revenue Code, effective for the taxable year that ended calendar year end, Year 2. Taxpayers' request was filed with our office on Date 1.

Facts

Taxpayers, a married couple referred to individually as Husband and Wife, filed on Date 2 a self-prepared joint federal income tax return for Year 2 (Year 2 Return) on which they reported that Husband was engaged in a securities trading business. At the end of Year 1, Taxpayers closed all of their open trading positions.

Husband currently works full time as the treasurer of an investment trust fund company and had previously served as a tax director of a financial services company. Husband has an accounting degree as well as a law degree, along with a years of tax experience in the financial services sector. Wife is currently employed as a teacher

During Year 1 and Year 2 Husband generally traded in options. By Date 3, Taxpayers claim to have suffered losses totaling $b from an investment in Partnership, an exchange traded fund, that was treated as a partnership for federal income tax purposes. Partnership held volatility-based futures contracts. After incurring these losses, Husband continued to trade options for the remainder of Year 2, producing additional losses of approximately $c.

Taxpayers represent that shortly after suffering the claimed loss of $b from the investment in Partnership in early Year 2, Husband concluded that his securities trading activity was a trade or business for which a § 475(f)(1) election could be made.

Taxpayers represent that they intended to make a mark-to-market election for Year 2. However, Taxpayers failed to make a timely § 475(f)(1) election, which was due by the due date of the federal income tax return for the taxable year preceding the year of change, without regard to extensions. In this case the election for Year 2 was due on Date 4. Husband asserts that he mistakenly assumed that the election could be made on their Year 2 Return. Husband claims he was unaware that the election had to be made by the due date (without regard to any extension) of the tax return for the taxable year preceding the year of change. Husband states that he did not discover this error until Year 3, when he began preparing Taxpayers' Year 2 Return.

On Date 5, Taxpayers filed a § 475(f)(1) election statement for the Year 2 tax year with Taxpayers' timely filed Year 2 Return (however, the election statement was d months too late by this time). Taxpayers reported gains and losses on a mark-to-market method on their Year 2 Return. Taxpayers also filed a Form 3115, Application for Change in Accounting Method, on Date 6. Taxpayers' request for an extension of time to make the § 475(f)(1) election under § 301.9100 was filed e months after the due date for filing the § 475(f)(1) election.

Law and Analysis

Taxpayers are not entitled to § 301.9100 relief to make a late § 475(f)(1) election because Taxpayers did not act reasonably and in good faith and granting relief would prejudice the interests of the Government.

Relief under § 301.9100 to make a late § 475(f)(1) election is denied

Section 475(f)(1) 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. 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.

Rev. Proc. 99-17, 1999-1 C.B. 503, provides the requirements for making an election under § 475(f). Under section 5.03 of that revenue procedure, a taxpayer must file its election statement not later than the due date (without regard to any extension) of the original federal income tax return for the taxable year immediately preceding the election year and must attach the statement either to that return or, if applicable, to a request for an extension of time to file that return. Section 5.04 of Rev. Proc. 99-17 provides the requirements for the statement. The statement must describe the election being made, the first taxable year for which the election is effective, and, in the case of an election under § 475(f), the trade or business for which the election is made. Section 4 of Rev. Proc. 99-17 provides that an election under § 475(f) determines the method of accounting that an electing taxpayer is required to use for federal income tax purposes

for securities subject to the election. Once a valid election is made, the taxpayer is required to use a mark-to-market method of accounting under § 475. Section 4 of Rev. Proc. 99-17 also provides that if a taxpayer fails to change its method of accounting to comply with the election, then taxpayer is on an impermissible method.

Section 6.01 of Rev. Proc. 99-17[1] provided that a change in a taxpayer's method of accounting is a change in method of accounting to which the provisions of §§ 446 and 481 and the regulations thereunder apply. Section 6.03 of Rev. Proc. 99-17 generally provided that if a taxpayer changes its method of accounting under section 6.01 of Rev. Proc. 99-17, the taxpayer must take into account the net amount of the § 481(a) adjustment over the applicable period.

Section 23.01 of Rev. Proc. 2017-30, 2017-18 I.R.B. 1131, provides procedures for a trader in securities that has made a § 475(f)(1) election to obtain automatic consent of the Commissioner to change its method of accounting for securities to use the mark-to-market method of accounting under § 475.[2] Section 23.01(4) of Rev. Proc. 2017-30 refers to section 5 of Rev. Proc. 99-17 for the requirements to make a § 475(f)(1) election.

Rev. Proc. 2015-13, 2015-5 I.R.B. 419, provides the general procedures under § 446(e) to obtain the consent of the Commissioner to change a method of accounting for federal income tax purposes, including the procedures to obtain the automatic consent of the Commissioner to change a method of accounting in Rev. Proc. 2017-30. Under section 7.02 of Rev. Proc. 2015-13, unless otherwise provided in a specific change listed in Rev. Proc. 2017-30, a taxpayer making a change in method of accounting must apply § 481(a) and take into account the § 481(a) adjustment in the manner provided in section 7.03 of Rev. Proc. 2015-13. Section 23.01 of Rev. Proc. 2017-30 does not contain an exception to the rule in section 7.02 of Rev. Proc. 2015-13.

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). Section 301.9100-1(b) defines the term election to include a request to change an accounting method.

Section 301.9100-3 sets forth rules that the Commissioner must use to determine whether it will grant an extension of time for regulatory elections that do not meet the requirements of § 301.9100-2 for an automatic extension. Generally, a taxpayer must provide the evidence to establish to the satisfaction of the Commissioner that the

[1] Section 6 of Rev. Proc. 99-17 was superseded by Rev. Proc. 99-49, 1999-2 C.B. 725.
[2] Rev. Proc. 2017-30 was the automatic method change revenue procedure that would have applied to Taxpayers' filing had it been timely filed.

taxpayer acted reasonably and in good faith, and the grant of relief will not prejudice the interests of the Government.

Except as provided in § 301.9100-3(b)(3), § 301.9100-3(b)(1) provides rules for when a taxpayer is deemed to have acted reasonably and in good faith. Section 301.9100-3(b)(1)(i) provides that a taxpayer will be deemed to have acted reasonably and in good faith if the taxpayer requests relief under § 301.9100-3 before the failure to make the regulatory election is discovered by the Service. Section 301.9100-3(b)(3) provides rules as to when a taxpayer is deemed to have not acted reasonably and in good faith. Section 301.9100-3(b)(3)(iii) provides that a taxpayer is deemed to have not acted reasonably and in good faith if specific facts have changed since the due date for making the election that make the election advantageous to a taxpayer. 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) provides that the Commissioner will grant a reasonable extension of time to make a regulatory election only when the interests of the Government will not be prejudiced by the granting of relief. Section 301.9100-3(c)(1)(i) provides that 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).

Section 301.9100-3(c)(2) provides special rules for accounting method regulatory elections. Section 301.9100-3(c)(2)(ii) provides that the interests of the Government are deemed to be prejudiced except in unusual and compelling circumstances if the accounting method regulatory election for which relief is requested requires an adjustment under § 481(a) (or would require an adjustment under § 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).

a) Taxpayers did not act reasonably and in good faith

Section 301.9100-3(b)(3)(iii) provides that a taxpayer is deemed to have not acted reasonably and in good faith if specific facts have changed since the due date for making the election that make the election advantageous to a taxpayer. 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.

To make a timely § 475(f)(1) election for Year 2, Taxpayers had to make the § 475(f)(1) election by the unextended due date of their tax return for Year 1. Taxpayers did not file their request for relief under § 301.9100-3 until Date 1. The late filing provided Taxpayers the benefit of e months of hindsight. During that time, Husband continued to trade in options. Taxpayers gained advantage from that

hindsight because Taxpayers were able to determine the effect of a § 475(f)(1) election with knowledge that Husband's ongoing options trading (a) produced additional losses of approximately $c, and (b) did not produce meaningful gain to absorb capital losses from Taxpayers' claimed loss of $b from their investment in Partnership. Taxpayers have failed to provide strong proof that specific facts have not changed since the due date for making the election that make the election advantageous to Taxpayers. Accordingly, under § 301.9100-3(b)(3), Taxpayers are deemed to have not acted reasonably and in good faith.

b) Granting Relief Would Prejudice the Interests of the Government

Under § 301.9100-3(c)(2)(ii), the interests of the Government are deemed to be prejudiced, except in unusual and compelling circumstances, if the accounting method regulatory election for which relief is requested requires an adjustment under § 481(a) (or would require an adjustment under § 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). Taxpayers have not presented unusual and compelling circumstances, but they instead argue that their accounting method regulatory election is not one that requires an adjustment under § 481(a) because their § 481(a) adjustment amount is zero. The § 481(a) adjustment is reported by Taxpayers to be zero because they disposed of all their securities prior to their Year 1 taxable year end.

Taxpayer's argument is misplaced. 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 use the mark-to-market method of accounting under § 475, it is an accounting method regulatory election subject to § 301.9100-3(c)(2). Further, a § 475(f)(1) election requires a change in method of accounting that requires a § 481(a) adjustment. The change is not permitted to be implemented on a cut-off method.[3]

Since a § 475(f)(1) election is an accounting method regulatory election to which § 481(a) applies, the interests of the Government are deemed to be prejudiced given that Taxpayers have failed to present unusual and compelling circumstances to justify granting the requested relief.

CONCLUSION

[3] Example 4 of § 301.9100-3(f) demonstrates that the language in § 301.9100-3(c)(2)(ii) does not apply to accounting method changes that are required to be made on a cut-off basis. By contrast, Example 5 of § 301.9100-3(f) illustrates that the interests of the Government are deemed to be prejudiced under § 301.9100-3(c)(2)(ii) if the facts are varied such that a cut-off method is not permitted for the accounting method change.

Based on the facts and representations submitted, we conclude that Taxpayers have not satisfied the requirements to justify granting an extension of time to make an election under § 475(f) to use the mark-to-market method of accounting. Specifically, Taxpayers have failed to demonstrate that they acted reasonably and in good faith, and that the grant of relief will not prejudice the interests of the Government. Accordingly, Taxpayers' request for an extension of time to make the § 475(f)(1) election for Year 2 is denied.

Except as expressly provided herein, no opinion is expressed or implied concerning the federal tax consequences of the transactions described above. Additionally, no opinion is expressed or implied as to whether Husband's trading activities constitute those of a trader in securities eligible to make the mark-to-market election under § 475(f)(1).[4]

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

Sincerely,

Patrick E. White
Senior Counsel, Branch 3
Office of the Associate Chief Counsel
(Financial Institutions and Products)

Enclosures
Copy of this letter
Copy for section 6110 purposes

cc:

[4] Based on information supplied by Taxpayers, however, there appears to be an issue as to whether Husband's trading activity was sufficiently regular, frequent and continuous for Husband to have been considered engaged in the business of a trader in securities under § 475(f)(1).