Internal Revenue Service

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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:B3
PLR-104091-21

Date:
August 04, 2021

LEGEND:

Husband =

Wife =

Partnership =

Company =

Law Firm =

State =

Date 1 =

Date 2 =

Date 3 =

Date 4 =

Date 5 =

Year 1 =

Year 2 =

y =

z =

Dear :

This letter responds to a request for a private letter ruling that Husband and Wife (collectively "Taxpayer") filed with the Internal Revenue Service (Service). Taxpayer's letter 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 ("the Code"), effective for the Year 1 taxable year, or in the alternative the Year 2 taxable year. Taxpayer requested relief on Date 1.

FACTS

Husband and Wife filed joint federal income tax returns for Year 1 and Year 2. Wife does not have a separate trade or business and was not employed during Year 1 or Year 2. Taxpayer uses a calendar year as its taxable year.

Husband worked for a large operator and manager . Husband entered into several joint ventures that owned and operated . Husband was responsible for managing the business operations of these facilities.

In late Year 1, certain were sold, which resulted in Husband recognizing gain under § 1231 of the Code. Husband used his share of the sales proceeds to fund two investment accounts. One account was held in Husband's name. The other account was held in the name of Partnership. Partnership was formed on Date 2. Partnership is a State limited liability corporation treated as a partnership for federal income tax purposes. Partnership uses a calendar year as its taxable year. Partnership is owned by Husband and Company. Taxpayer represents that pursuant to a partnership agreement all items attributable to Partnership's trading activities are allocated to Husband. Taxpayer represents that Husband became a day-trader in late Year 1. Taxpayer represents that Husband engaged in trading activity on behalf of Taxpayer, and through and on behalf of Partnership, from late Year 1 through Year 2.

Taxpayer represents that Husband believed that gain or loss from the trading activities would be treated as ordinary gain or loss. Specifically, Taxpayer represents that Husband believed that losses from his trading activities in Year 2 could be carried back as ordinary losses to Year 1 to offset the § 1231 gains in Year 1. Taxpayer represents that Husband was unaware of the mark to market election under § 475(f). Taxpayer engaged the services of Law Firm in Date 3. Taxpayer represents, that at this

time, Taxpayer became aware of the § 475(f) election requirement and of the procedure supporting a request to make a late § 475(f) election.

LAW AND ANALYSIS

Taxpayer is not entitled to relief under § 301.9100 to make a late § 475(f)(1) election for Year 1 or Year 2, because Taxpayer 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, sets forth the requirements for making an election under § 475(f). Under section 5.03 of that revenue procedure, a taxpayer must file an 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 sets forth 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 the taxpayer's method of accounting to comply with the election, then the taxpayer is on an impermissible method.

Section 6.01 of Rev. Proc. 99-17[1] provides 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 promulgated thereunder apply. Section 6.03 of Rev. Proc. 99-17 generally provides 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 24.01 of Rev. Proc. 2018-31, 2018-22 I.R.B. 637, provides procedures for a trader in securities that has made a § 475(f)(1) election to obtain automatic consent of the Commissioner to change the trader's method of accounting for securities

[1] Section 6 of Rev. Proc. 99-17 was superseded by Rev. Proc. 99-49, 1999-2 C.B. 725.

to use the mark-to-market method of accounting under § 475.[2] Section 24.01(4) of Rev. Proc. 2018-31 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, sets forth 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. 2018-31. Under section 7.02 of Rev. Proc. 2015-13, unless otherwise provided in a specific change listed in Rev. Proc. 2018-31, 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. 2018-31 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 sufficient evidence to establish to the satisfaction of the Commissioner that the taxpayer acted reasonably and in good faith, and that 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 determining 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)

[2] Rev. Proc. 2018-31 is the automatic method change revenue procedure that would have applied to Taxpayer's election filing, had it been timely filed.

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 1 or Year 2, Taxpayer had to make the § 475(f)(1) election by Date 4 for Year 1, or by Date 5 for Year 2. Date 4 and Date 5 are the respective due dates of Taxpayer's federal income tax returns (without regard to extensions) for each taxable year immediately preceding Year 1 and Year 2. Taxpayer's request for relief under § 301.9100-3 was not made until Date 1. Taxpayer's request for a late filing of the § 475(f)(1) election was made with the benefit of y months of hindsight for Year 1, and z months for Year 2. Husband continued to trade during late Year 1 and Year 2. Taxpayer gained a benefit from hindsight because Taxpayer was able to determine the effect of a § 475(f)(1) election with the benefit of knowing Husband's trading results for Year 1 and Year 2. Moreover, Taxpayer failed to provide strong proof showing that its decision to seek relief to make a late election did not involve hindsight. Accordingly, under § 301.9100-3(b)(3), Taxpayer is 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). Taxpayer has not presented unusual and compelling circumstances for its failure to timely make a § 475(f)(1) election.

Since a § 475(f)(1) election is an accounting method regulatory election that

requires a § 481(a) adjustment, the interests of the Government are deemed to be prejudiced because Taxpayer has failed to present unusual and compelling circumstances to justify granting the requested relief.

CONCLUSION

Based on the facts and representations submitted, we conclude that Taxpayer has not satisfied the requirements to justify granting an extension of time under § 301.9100-3 to make an election under § 475(f)(1) to use the mark-to-market method of accounting effective for the Year 1 taxable year, or in the alternative the Year 2 taxable year. Specifically, Taxpayer has failed to demonstrate that Taxpayer acted reasonably and in good faith, and that granting relief will not prejudice the interests of the Government. Accordingly, Taxpayer's request for an extension of time to make an election under § 475(f)(1) for Year 1, or in the alternative for Year 2, is denied.

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

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

In accordance with the terms of a power of attorney on file in this office, a copy of this letter is being sent to your authorized representatives.

Sincerely,

_____

K. Scott Brown
Branch Chief, Branch 3
Office of the Associate Chief Counsel
(Financial Institutions and Products)

Enclosures:

Copy of this letter
Copy for section 6110 purposes

cc: