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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:B01
PLR-154156-06

Date:
May 21, 2007

Legend

Taxpayer =

Accountant =

Date 1 =

Date 2 =

Date 3 =

Date 4 =

Date 5 =

Date 6 =

Month 1 =

Year 1 =

Year 2 =

Year 3 =

Year 4 =

x =

y =

Dear :

This is in response to your letter requesting an extension of time under section 301.9100-3 of the Procedure and Administration Regulations to make an election under section 475(f) of the Internal Revenue Code (Code) to use the mark-to-market method of accounting beginning with Year 3. Taxpayer uses a calendar year in preparing his federal income tax returns.

Taxpayer represents he became a trader in securities in Year 2 and remained a trader in Year 3.¹ Accountant had been retained to prepare Taxpayer's returns for Year 1, Year 2, and Year 3. Taxpayer's Year 3 return was filed Date 4 without using the mark-to-market method of accounting. When Taxpayer filed his Year 3 tax return, he had no personal knowledge of the availability of the election under section 475(f) and was not advised thereof by Accountant. However, Taxpayer did sustain a loss of \$x between Date 1 and Date 2. The due date of the section 475(f) election for Year 3 was Date 3.

Upon learning of the election under section 475(f), Taxpayer hired another accountant who filed an amended Year 3 tax return using the mark-to-market method of accounting. The amended return was filed on Date 5 but was rejected by the Internal Revenue Service due to the expiration of the statute of limitations.

In Month 1 of Year 4, Taxpayer filed a complaint for malpractice against Accountant, claiming that Accountant should have advised Taxpayer of the availability of the section 475(f) election. The case settled and was dismissed with prejudice.

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

¹We are treating Taxpayer as a trader in securities solely for purposes of this ruling. We have not considered, and therefore express no opinion, whether Taxpayer qualifies as a trader in securities.

election shall be made at such time and in such manner as the Secretary shall prescribe.

On February 16, 1999, the Internal Revenue Service published Revenue Procedure 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). 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 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. A method of accounting for securities subject to the election is impermissible unless the method is in accordance with section 475 and the regulations thereunder. If an electing trader's method of accounting for its taxable year immediately preceding the election year is inconsistent with section 475, the taxpayer is required to change its method of accounting to comply with its election. Thus, a taxpayer that makes a section 475(f) election but fails to change its method of accounting to comply with that election is using an impermissible method.

Section 6.03 of Rev. Proc. 99-17 provides that a taxpayer that changes its method of accounting pursuant to Rev. Proc. 99-17 must take into account the net amount of the section 481(a) adjustment.

Section 301.9100-1(c) of the regulations provides, in part, that the Commissioner has discretion to grant a reasonable extension of time to make a regulatory election (defined in section 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 section 301.9100-2. Section 301.9100-3(b) provides that subject to paragraphs (b)(3)(i) through (iii) of section 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 section 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. 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 section 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).

As noted above, 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. If an electing trader's method of accounting for its taxable year immediately preceding the election year is inconsistent with section 475, the taxpayer is required to change its method of accounting to comply with its election. A taxpayer that makes a section 475(f) election but fails to change its method of accounting to comply with that election is using an impermissible method. 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 section 301.9100-3(c)(2).

Rev. Proc. 2002-9 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 10A.02(2)(a)(i) of the Appendix to Rev. Proc. 2002-9.

Taxpayer requests an extension of time to make an accounting method regulatory election that is subject to the provisions of section 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 section 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 Vines v. Commission, 126 T.C 279 (2006) the court held that the petitioner was entitled to an extension of time to file a section 475(f) election pursuant to section 301.9100-3. The court recognized, in general, that a taxpayer must establish to the satisfaction of the Commissioner that the taxpayer acted reasonably and in good faith, and the grant of relief will not prejudice the interests of the government. The court focused on the definition of reasonableness and good faith contained in section 301.9100-3(b)(1). Section 301.9100-3(b)(3) provides three exceptions to this definition. The third exception provides a taxpayer will be deemed not to have acted reasonably and in good faith if the taxpayer uses hindsight in requesting relief. In Vines the petitioner made no trades and held no securities between the date the election to use the mark-to-market method of accounting was due and the date he filed his request for relief. The Tax Court concluded there was not hindsight. In this case, Taxpayer continued to trade and hold securities after the election was due. Since Taxpayer did not file his request for relief until Date 6, he had the benefit of over y years of hindsight he would not otherwise have had, 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 by Date 3, he would not have had the benefit of knowing the results of his security transactions after that date and he would not have had this time to act on that knowledge. Therefore, Taxpayer has failed to demonstrate that 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 Year 3 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.

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, or the tax treatment of any conditions existing at the time of or effects resulting from the transaction, which are not specifically set forth by the above ruling.

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.

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,

Elizabeth A. Handler
Chief, Branch 1
Office of Associate Chief Counsel
(Financial Institutions & Products)

cc: