



American Institute of CPAs
1455 Pennsylvania Avenue, NW
Washington, DC 20004-1081

January 23, 2015

The Honorable Orrin G. Hatch, Chairman
Senate Committee on Finance
219 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Paul D. Ryan, Chairman
House Committee on Ways & Means
1102 Longworth House Office Building
Washington, DC 20515

The Honorable Ronald L. Wyden
Ranking Member
Senate Committee on Finance
219 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Sander M. Levin
Ranking Member
House Committee on Ways & Means
1236 Longworth House Office Building
Washington, DC 20515

RE: Tax Reform Administrative Relief for Various Statutory Elections

Dear Chairmen Hatch and Ryan, and Ranking Members Wyden and Levin:

As Congress considers tax reform, the American Institute of Certified Public Accountants (AICPA) suggests Congress include in the tax reform legislation important technical changes to permit administrative relief (i.e., providing the Internal Revenue Service (IRS or “Service”) permission to grant “section 9100¹ relief”) for certain late or defective elections upon a showing of good cause by a taxpayer. Section 9100 relief, which is currently available with regard to some elections, is extremely valuable for taxpayers who miss the opportunity to make certain tax elections. Congress needs to provide statutory authority in order for the IRS to have authority to grant administrative relief in appropriate situations for provisions that have statutory deadlines and relief is not already authorized.

The AICPA previously submitted a similar [legislative suggestion](#) on October 14, 2013, and on July 30, 2013, a detailed [legislative recommendation](#) regarding technical changes to permit administrative relief for certain late or defective lifetime (i.e., inter vivos) qualified terminable interest property (QTIP) elections and for late elections by certain qualified revocable trusts (QRTs) as part of a decedent’s estate. We have now added to the list needed section 9100 relief for missed estate tax spousal portability elections.

The AICPA is the world’s largest member association representing the accounting profession, with more than 400,000 members in 128 countries and a history of serving the public interest since 1877. Our members advise clients on federal, state and international tax matters, and prepare income and other tax returns for millions of Americans. Our members provide services to individuals, not-for-profit organizations, small and medium-sized business, as well as America’s largest businesses.

¹ All references herein to “section” or “§” are to the Internal Revenue Code of 1986, as amended, or the Treasury Regulations promulgated thereunder.

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Background

There are many tax elections available to taxpayers, some with statutory deadlines, and others that have deadlines provided for in Treasury regulations. If a taxpayer fails to make a proper, timely election, certain extensions and administrative relief options are available if the taxpayer can obtain “section 9100 relief” under Treas. Reg. §§ 301.9100-1 through -3.

The term “election” for which section 9100 relief is available is defined in Treas. Reg. § 301.9100-1(b) as “an application for relief in respect of tax; a request to adopt, change, or retain an accounting method or accounting period.”

The IRS has the authority to provide taxpayers with section 9100 relief from certain late elections by granting extensions of time to make those elections. Section 9100 relief requires the taxpayer to establish to the satisfaction of the IRS Commissioner that the taxpayer acted reasonably and in good faith and that the grant of relief will not prejudice the interests of the government. Specifically, under Treas. Reg. § 1.9100-1, the Commissioner has discretion, upon a showing of good cause by a taxpayer, to grant a reasonable extension of the time fixed by the regulations to make an election or other application for relief in respect of tax under subtitle A of the Internal Revenue Code (“Code”).

Section 9100 relief is available for elections, the timing of which is prescribed by regulation, rather than by statute. Therefore, section 9100 relief currently is not available with respect to requests for extensions of the time fixed by the Code for making an election or applications for relief from statutory deadlines.

Recommendation

Congress should consider making section 9100 relief available for all tax elections, whether prescribed by regulation or statute. The AICPA has compiled the following list of elections (not all-inclusive) for which section 9100 relief currently is not granted by the IRS as the deadline for claiming such elections is set by statute. The IRS has issued various rulings stating that it does not have the authority to grant section 9100 relief when the deadline for the election is set by statute.² The AICPA suggests Congress consider providing the IRS

² See [PLR 201109012](#) in which the IRS stated “Because section 301.9100-3 is applicable only to requests for extensions of time fixed by regulations or other published guidance, the Service does not have the discretion to grant an extension of time under section 301.9100-3 to make the QTIP election under [section 2523\(f\)\(4\)](#) for the Year 1 transfer to Trust.” See also [PLR 201316008](#) in which the IRS granted 9100 relief and stated, “In this case, the time for filing the Election is fixed by regulations (i.e., §§ 1.1502-47(l)(3)(i) and 1.1502-47(l)(3)(iii), incorporating the rules prescribed under § 1.1502-21 (including the specific rules under § 1.1502-21(b)(3)(i)) to the extent not inconsistent with § 1.1502-47(l)(3)). Therefore, the Commissioner has discretionary authority under § 301.9100-3 to grant an extension of time for Parent to file the Election, provided Parent acted

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permission to grant section 9100 relief for the following statutory deadline elections. We do not believe taxpayers are likely to abuse or exploit hindsight, as the IRS would continue to have discretion as to whether to grant relief for each specific request that is made in good faith and is reasonable.

1. Section 42(b)(1)(A)(ii) – Election for the month in which a building is placed in service for low-income housing credit. This election allows the taxpayer, with the consent of the housing credit agency, to determine the applicable credit percentage before the building’s placed-in-service date.
2. Section 126(c)(2) – Election for section 126(a) (providing for specific exclusions of cost-sharing payments from gross income) and section 1255 (exempting from income any gain from disposition of property under section 126(a)) not to apply.
3. Section 148(f)(4)(C)(viii) – Election to terminate application of 1.5 percent penalty provided for in section 148(f)(4)(C)(vii) after the end of the “temporary period” described therein.
4. Section 148(f)(4)(C)(ix) – Election to terminate application of 1.5 percent penalty provided for in section 148(f)(4)(C)(vii) before the end of the “temporary period” described therein.
5. Section 148(f)(4)(C)(xv) – Catch-all timing provision applying to elections made under section 148(f)(4)(C) other than under clauses (viii) and (ix).
6. Section 172(b)(1)(H)(iii)(II) – Election to carry back a net operating loss (NOL) up to five preceding tax years for a 2008 or 2009 NOL for a stand-alone entity return. The election is regulatory under Treas. Reg. § 1.1502-21 for a consolidated return.
7. Section 172(b)(3) – Election to waive an NOL carryback for a stand-alone entity return. The election is regulatory under Treas. Reg. § 1.1502-21 for a consolidated return.
8. Section 174(b)(2) – Election to amortize certain research and experimental expenditures.
9. Section 181(c)(1) – Election to treat certain costs of a qualified film or television production as an expense.

reasonably and in good faith, the requirements of §§ 301.9100-1 and 301.9100-3 are satisfied, and granting relief will not prejudice the interest of the government.”

10. Section 264(e)(2)(B)(ii)(II) – Election for the number of months in an “applicable period” related to the applicable rate of interest in pre-1986 contracts.
11. Section 280C(c) – Election to claim a reduced credit for research activities.
12. Section 413(c)(4)(B) – Election by collectively bargained plan administrator of plans not described in subparagraph (A), to have the provisions of subparagraph (A) apply.
13. Section 547(d) – Extension of time (90 days allowed) for a distribution of dividends of a personal holding company to qualify as “deficiency dividends” under section 547. See [Rev. Rul. 86-104](#) for details.
14. Section 614(b)(4) – Election to treat operating mineral interests on a single tract of land as separate properties.
15. Section 614(c)(3) – Election to aggregate separate interests in mines under section 614(c)(1) and election to treat a single interest as more than one property under section 614(c)(2).
16. Section 617(b)(2)(B) – Election to include recapturable adjusted exploration expenditures in gross income.
17. Section 645(c) – Election to treat certain qualifying revocable trusts as part of decedent’s estate.
18. Section 814(g) – Election by a domestic mutual life insurance company to exclude from taxable income certain items of the company’s contiguous country life insurance branch, which the company separately accounts.
19. Section 992(b)(1)(A) – Election by a corporation to be treated as a domestic international sales corporation (DISC).³
20. Section 1042(c)(6) – Election for non-recognition of gain on certain sales of qualified securities to employee stock ownership plans or certain cooperatives.
21. Section 1294(d) – Election to extend (subject to certain limitations) the time for payment of any undistributed passive foreign investment company (PFIC) earnings tax liability for the taxable year.

³ Commissioner has determined that part of this election is regulatory, while another part is statutory with respect to which 9100 relief is not available. See [PLR 201327004](#).

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22. Section 2010(c)(5)(A) – Election to transfer a decedent’s unused exclusion amount (known as a deceased spousal unused exclusion (DSUE) amount) to the decedent’s surviving spouse. The election must be made on an estate tax return that is filed by the time prescribed by law (including extensions) for filing such return.⁴
23. Section 2523(f)(4)(A) – Election to designate an inter vivos transfer as qualified terminable interest property (QTIP). It is required on or before the date prescribed by section 6075(b) for filing a gift tax return with respect to the transfer. The IRS has determined that the deadline for making the gift tax QTIP election is statutory, and, therefore, section 9100 relief is not available. See PLR 9641023 (July 10, 1996).
24. Section 6015(b)(1)(E) – Election to obtain benefits of “innocent spouse” relief.
25. Section 6166(d) – Election to pay in installments the estate tax imposed on the value of certain qualifying estates.
26. Section 6166(h)(2) – Election to pay in installments any deficiency in the estate tax imposed on the value of certain qualifying estates.

* * * * *

We appreciate your consideration of these comments. Please feel free to contact me at (801) 523-1051, or tlewis@sisna.com, or Eileen R. Sherr, AICPA Senior Technical Manager, at (202) 434-9256, or esherr@aicpa.org to discuss the above comments or if you require any additional information.

Sincerely,



Troy K. Lewis, CPA
Chair, AICPA Tax Executive Committee

cc: Mr. Thomas A. Barthold, Chief of Staff, Joint Committee on Taxation
The Honorable Mark Mazur, Assistant Secretary for Tax Policy, Department of the Treasury

⁴ The IRS has authority to grant extensions of time to make the portability election if the estate is not otherwise required to file a federal estate tax return because it is below the filing threshold. See, for example, [Revenue Procedure 2014-18](#), in which the IRS granted temporary relief to 2011-2013 estates below the filing threshold who missed filing the election and permitted those estates to make the election by filing an estate tax return by December 31, 2014. This relief was not available to estates over the filing threshold that missed making the portability election.

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Ms. Lisa Zarlenga, Tax Legislative Counsel, Office of Tax Policy, Department of the
Treasury
The Honorable John Koskinen, Commissioner, Internal Revenue Service
The Honorable William J. Wilkins, Chief Counsel, Internal Revenue Service