“9100 Relief” Can Save A Missed Election

Treas. Reg. § 301.9100-3

“9100 relief” refers to letter rulings that can be issued pursuant to Treas. Reg. §301.9100-3 granting an extension of the time to make an election permitted by the regulations or the statutes. Classic cases to which it can apply include the making of an I.R.C. § 338 election, particularly with respect to the purchase of a foreign corporation, and the I.R.C. § 1362 election related to Subchapter S status. It contains two broad requirements: (1) the taxpayer acted reasonably and in good faith, and (2) the relief will not prejudice the interests of the government.

Prejudice to the Government

The second requirement is not as broad as it seems. Normally taxpayers seek relief in order to save taxes, which could be viewed as prejudicing the interests of the government; the regulation makes clear that this is not a problem. Rather, relief will be denied if the late election produces more tax savings than a timely election would have produced (taking into account the time value of money). Relief normally is unavailable for closed years, because such relief perhaps could produce a better result if the I.R.S. were precluded from making an adjustment that it otherwise would have made if the election had been timely. An exception as to closed years can apply where all affected taxpayers affirm that they reported as if the election had been timely made.

Good Faith

Thus, the good faith rule rather than the prejudice to the government rule generally is the heart of the requirements. In the typical cases involving corporate taxpayers, the failure will have been the “fault” of a tax professional, who was both competent and aware of all the facts. Within this category, the regulation states two circumstances that will deem the taxpayer not to have acted in good faith: (1) it “was informed in all material respects of the required election and related tax consequences, but chose not to file the election,” or (2) it uses hindsight.

The first exception appears to reflect the view that the whole procedure aims to do equity, and an aspect of equity is fairness vis a vis all other taxpayers who similarly might like a second bite at the apple, rather than being constrained by due dates. It is not enough just for the taxpayer to change its mind. Rather, there must be some element of non-negligent error on the part of the taxpayer itself, or bad advice from the tax professional.

Hindsight

The regulation states as an example that a change in specific facts after the election’s due date that makes the election advantageous to the taxpayer normally precludes relief unless the taxpayer makes “strong proof” that the decision did not rest on that change of facts to make a hindsight choice for the election. In a way this seems to be an aspect of the separate requirement that relief will not be granted to the taxpayer that initially chose to forego the election, based on all relevant information at that time, but later with hindsight determines that the election should have been made.

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It is not clear whether the regulation’s example of changed facts is the exclusive example of hindsight. A related example might be where an election can have good or bad consequences, depending on later events, and the taxpayer initially thought the facts would dictate bad consequences but the facts turned out to the contrary. A possible example of such case would be Priv. Ltr. Rul. 200209054 (Mar. 1, 2002), a rare negative private letter ruling. It denied relief for a late election of the option to mark to market, because there would be a § 481 adjustment for marking the securities to market at the beginning of the year (spreading the net income item over four years) and then the taxpayer’s (unexpected) loss for the year of change would be allowed as an NOL rather than a capital loss. The ruling denied relief because of the § 481 adjustment, and did not get to the hindsight issue, but the loss occurring for the year after the election due date could be viewed as a changed fact that involves hindsight, or it could be viewed as failing under a “heads the taxpayer wins, tails the government loses” view.

The typical case will not involve hindsight where the tax advisor simply missed a beneficial election and the taxpayer was not sufficiently informed to be held to have made a choice. The relief will be granted where (1) there was no change of facts, (2) there was no initial well-informed decision not to make the election, (3) the professional either was aware of all relevant facts or, if the professional did not have all the relevant facts, the taxpayer reasonably was unaware of that (see Priv. Ltr. Rul. 200320003 (Jan. 28, 2003)), but (4) rather the professional simply made a mistake, for whatever reason. Another example is Priv. Ltr. Rul. 200320014 (Feb. 4, 2003) where apparently the taxpayer simply figured out too late that it could get a better withholding tax result if it were a corporation.

Foreign § 338 Elections

This is a classic pattern where the forbidden hindsight does not involve a taxpayer’s realizing that an election would have been beneficial, even though that is within the street definition of hindsight. That is why relief is granted so that elections under § 338 can be made as to qualified stock purchase acquisitions of foreign corporations. Normally such an election can permit an inside asset basis step up with no U.S. tax due. It also can be motivated by a desire to close the target’s taxable year so that the buyer does not have to worry about the target’s subpart F income prior to the closing. Therefore, failure to make the election can be a simple error, which hindsight reveals. Nevertheless, because the facts did not change and the taxpayer was not fully advised of all relevant facts (i.e. the benefits) at the earlier date, rulings like Priv. Ltr. Rul. 200316013 (Jan. 6, 2003) allow relief upon a representation that “for various reasons the election was not filed.” Perhaps more forthcoming is Priv. Ltr. Rul. 200316013 (Dec. 31, 2002), which says that taxpayer relied on the tax advisor and he did not advise the taxpayer to make the election. Thus, it is not necessary in all of these cases to say that you intended to make the election but slipped up and did not follow through.

Another common source of 9100 relief is for missed check-the-box elections.

Conclusion

Failure to timely file or make an election allowed by the I.R.C. is not necessarily irreversible. § 9100 relief provides another chance for inadvertent missed elections.

For additional information contact Kevin Rowe (212) 210-9505 or Sam Kaywood (404) 881-7481.