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Internal Revenue Service

Department of the Treasury

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CC:DOM:IT&A:5 PLR-106220-99

Date: MAY 20 1999

Taxpayers =

Date 1 =
Date 2 =
Date 3 =
Date 4 =
Date 5 =
Date 6 =
Mr. Z =

Dear

This responds to your letter of March 16, 1999, and subsequent correspondence, requesting an extension of time, under §§ 301.9100-1 and -3 of the Procedure and Administration Regulations, for Taxpayers to make an election to capitalize taxes and carrying charges on investment property pursuant to § 266 of the Internal Revenue Code.

It has been represented that Taxpayers acquired a piece of unimproved land on Date 1 which was intended as investment property. At that time and for several years thereafter, Taxpayers were unable to deduct taxes and interest connected to acquisition of the property. On or about Date 2 they hired Mr. Z, an attorney, who on Date 3 quickly informed Taxpayers that there was an election available to capitalize interest and taxes on the property. He advised Taxpayers to file amended returns to elect to

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capitalize interest and real estate taxes. That advice was incorrect, because a private ruling request under Revenue Procedure 99-1, 1999-1 I.R.B. 6 is necessary to request relief under §301.9100-1 of the regulations. Such relief was requested on Date 4. The property was sold on Date 5.

The regulations under § 301.9100-3 provide extensions of time for making regulatory elections that do not meet the requirements of § 301.9100-2. For this purpose, § 301.9100-1 defines the term "election" to includes a request to adopt, change or retain an accounting method, and the term "regulatory election" to include an election whose deadline is prescribed by a revenue procedure.

Section 301.9100-3(a) of the regulations provides, in part, that requests for relief will be granted when the taxpayer provides evidence (including affidavits) to 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.

Section 301.9100-3(b)(1) of the regulations provides, in part, that except as provided in paragraphs (b)(3)(i) through (iii) of this section, a taxpayer is deemed to have acted reasonably and in good faith if the taxpayer reasonably relied on a qualified tax professional and the tax professional failed to make, or advise the taxpayer to make, the election.

Section 301.9100-3(b)(3) of the regulations provides, in part, that a taxpayer is deemed to have not acted reasonably and in good faith if the taxpayer (i) seeks to alter a return position for which an accuracy-related penalty has been or could be imposed under § 6662 at the time the taxpayer requests relief (taking into account any qualified amended return filed within the meaning of § 1.6664-2(c)(3) of this chapter) and the new position requires or permits a regulatory election for which relief is requested; (ii) was informed in all material respects of the required election and related tax consequences, but chose not to file the election; or (iii) uses hindsight in requesting relief. In connection with hindsight, if specific facts have changed since the due date for making the election that make the election advantageous to the taxpayer, the IRS will not ordinarily grant relief. In such a case, the IRS 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)(1)(i) of the regulations provides, in part, 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 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)(1)(ii) of the regulations provides, in part, that the interests of the government are ordinarily prejudiced if the taxable year in which

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the regulatory election should have been made, or any taxable years that would have been affected by the election had it been timely made are closed by the period of limitations on assessment.

Section 301.9100-3(c)(2) of the regulations provides, in part, 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 (i) is subject to the procedure described in § 1.446-1(e)(3) (requiring advance written consent of the Commissioner [through a formal application filed on Form 3115]); (ii) 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); (iii) would permit a change from an impermissible method of accounting that is an issue under consideration by examination, an appeals office, or a federal court and the change would provide a more favorable method or more favorable terms and conditions than if the change were made as part of an examination; or (iv) provides a more favorable method of accounting or more favorable terms and conditions if the election is made by a certain date or taxable year.

The affidavits presented by Taxpayers in the present case make a showing of reasonableness and good faith on the part of Taxpayers because Taxpayers eventually consulted a qualified tax professional, Mr. Z, an attorney, who then discovered the error, and quickly suggested corrective action. If Taxpayers had known of the availability of the election at the end of any of the years of ownership, they would have made the election, because at no time could they deduct taxes and interest since they did not itemize deductions for those years.

In the present case, Taxpayers are not seeking to alter a return position. Rather they have computed an increased basis to use the interest and real estate taxes that they were unable to deduct. Taxpayers are only seeking to legitimize the use of this method by making the election as required in § 266 of the Code. Also, Taxpayers were not informed until after the deadline for making the election that the election had to be made. Finally, there was no hindsight involved in Taxpayer's decision to request relief under § 301.9100-3 of the regulations because specific facts have not changed since the due date for making the election that make the election advantageous to the Taxpayers. Taxpayers will not have a lower tax liability in the aggregate fro all the years in which the election would apply.

Taxpayers are electing to use the method described in § 266 of the Code for 1998. Finally, there is no indication that the regulatory election for which relief is requested provides a more favorable method of accounting or more favorable terms and conditions if the election is made by a certain date or taxable year. Taxpayers have

demonstrated that: (a) they acted reasonably and in good faith; and (b) granting relief will not prejudice the interests of the government. Furthermore, the time for making elections under § 266 is not expressly prescribed by statute and Taxpayers' request for relief was filed within such time as the Commissioner considers reasonable under the circumstances.

The consent of the Commissioner is hereby granted Taxpayers, for the tax year ended on Date 6 and subsequent years, to comply with the requirements of § 266 of the Code for making the election to capitalize interest and real estate taxes. Accordingly, Tapayers are granted an extension of time until 30 days from the date of this letter to properly execute the election to capitalize interest and taxes under § 266 of the Code for the tax year ended on Date 6. The election shall be made in accordance with the regulations under § 266 and shall be filed with the District Director's office having jurisdiction over the Taxpayers' tax return. Please attach a copy of this ruling to the amended returns, schedules and forms filed in connection with making the election under § 266 when such forms are filed.

No opinion is expressed as to the application of any other provision of the Code or the regulations which may be applicable under these facts. Section 6110(j)(3) of the Code provides that private letter ruling may not be used or cited as precedent.

Sincerely yours,

Assistant Chief Counsel
(Income Tax & Accounting)

by David L. Crawford, Jr.
David L. Crawford, Jr.
Chief, Branch 5