

Internal Revenue Service

Department of the Treasury

Number: **200234023**
Release Date: 8/23/2002
Index Number: 108.02-01; 9100.00-00

Washington, DC 20224

Person to Contact:

Telephone Number:

Refer Reply To:

CC:ITA:4-PLR-111142-02

Date:

May 14, 2002

Legend

B =

P =

Y =

date =

year X =

Dear _____ :

This is in reply to the private letter ruling request in which the taxpayer, B, has asked for an extension of time to make an election under § 108(b)(5) of the Internal Revenue Code.

Facts

B owns a 99 percent limited partnership in P and 100 percent of the stock of P's 1 percent corporate general partner. P entered into a settlement agreement with Y on date and realized income from the discharge of an indebtedness. Under § 702(a), B was allocated his share of P's income resulting from the discharge of indebtedness. B included the income resulting from the discharge on his year X federal tax return because his tax advisors, principals or partners at an accounting firm, failed to notify him of the availability of an election under § 108 to reduce the basis of depreciable property and exclude the income. B was insolvent at the time the settlement agreement was entered into.

Other companies controlled by B also used the same tax advisors as B used. Several years after year X the other companies were contemplating changing tax advisors. The person being considered to assume this role was asked to review B's federal tax returns and the companies' returns. During that review B first learned of the application

of § 108.

Law and Analysis

Under § 61(a)(12) gross income includes income from the discharge of indebtedness. Section 108(a)(1)(B) provides that gross income does not include any amount that would be includible in gross income by reason of the discharge of indebtedness of the taxpayer if the discharge occurs when the taxpayer is insolvent.

Section 108(b)(1) provides that the amount excluded from gross income shall be applied to reduce certain tax attributes of the taxpayer. Section 108(b)(2) provides generally, except as provided in § 108(b)(5), that the reduction shall be made to tax attributes in the following order: (A) net operating losses, (B) general business credits, (C) minimum tax credits, (D) net capital losses and capital loss carryovers, (E) basis of property, (F) passive activity losses, and (G) foreign tax credit carryovers. Section 108(b)(5) states that the taxpayer may elect to apply any portion of the amount excluded from income to the reduction under § 1017 of the basis of the depreciable property of the taxpayer.

Section 108(d)(6) provides that the amount excluded from gross income under section 108(a) is applied at the partner level rather than the partnership level.

Section 1017(b)(2) provides, in general, that in the event of exclusion from income of discharge of indebtedness income by an insolvent taxpayer under § 108(a)(1)(B), the reduction in basis of property shall not exceed the excess of the total basis of property held by the taxpayer over the taxpayer's total liabilities. However, this limitation does not apply to any reduction in basis by reason of an election under § 108(b)(5).

Section 301.9100-13T(d) of the Procedure and Administration Regulations provides that an election under § 108(b)(5) must be made with the taxpayer's income tax return for the taxable year in which the discharge occurs. However, if the taxpayer establishes to the satisfaction of the Commissioner reasonable cause for failure to file the election with the taxpayer's original return, the taxpayer may file the election with an amended return or claim for credit or refund. Section 301.9100-13T is generally effective for discharges of indebtedness occurring after December 31, 1980, and before October 22, 1998.

Section 301.9100-3 provides that requests for extensions of time for regulatory elections will be granted when the taxpayer provides evidence to establish that the taxpayer acted reasonably and in good faith and granting relief will not prejudice the interests of the government.

Section 301.9100-3(b)(1) states that a taxpayer will be deemed to have acted reasonably and in good faith if the taxpayer—

- (i) requests relief before the failure to make the regulatory election is

- discovered by the Service;
- (ii) inadvertently failed to make the election because of intervening events beyond the taxpayer's control;
- (iii) failed to make the election because, after exercising due diligence, the taxpayer was unaware of the necessity for the election;
- (iv) reasonably relied on the written advice of the Service; or
- (v) reasonably relied on a qualified tax professional, and the tax professional failed to make, or advise the taxpayer to make, the election.

Under § 301.9100-3(b)(3), a taxpayer will not be considered to have acted reasonably and in good faith if the taxpayer—

- (i) seeks to alter a return position for which an accuracy-related penalty could be imposed under § 6662 at the time the taxpayer requests relief and the new position requires a regulatory election for which relief is requested;
- (ii) was fully informed of the required election and related tax consequences, but chose not to file the election; or
- (iii) uses hindsight in requesting relief. If specific facts have changed since the original deadline that make the election advantageous to a taxpayer, the Service will not ordinarily grant relief.

Section 301.9100-3(c) states that the Commissioner will grant a reasonable extension of time only when the interests of the government will not be prejudiced by the granting of relief. Under paragraph (i), 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).

B represents that he failed to make an election under § 108(b)(5) because he was unaware of the necessity for the election. B had relied on a qualified tax professional who failed to advise B to make the election. In addition, B has requested relief before the failure to make the election was discovered by the Service.

B is deemed to have acted reasonably and in good faith under § 301.9100-3(b)(1). In addition, based on the facts as represented, we have determined that § 301.9100-3(b)(3) is inapplicable. Further, based on the facts as represented, we have determined that the interests of the government will not be prejudiced by granting the requested relief.

Conclusion

B is granted an extension of time to make an election under § 108(b)(5) on a timely filed amended return.

Caveats

PLR-111142-02

The ruling contained in this letter is based upon information and representations submitted by the taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. While this office has not verified any of the material submitted in support of the request for ruling, it is subject to verification on examination.

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter. This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) provides that it may not be used or cited as precedent. Enclosed is a copy of the letter ruling showing the deletions proposed to be made in the letter when it is disclosed under § 6110.

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,
Robert A. Berkovsky
Branch Chief
Office of Associate Chief Counsel
(Income Tax & Accounting)

Enclosure