

# Too Late or Not at All? Tax Elections and Relief for Missing Them

January 25, 2022

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# Agenda

- Tax Elections Generally
- 9100 Relief Overview
- Issues in Practice
- Conclusion

# Tax Elections Generally

# Tax Elections Generally

- Elections exist throughout the Internal Revenue Code and Regulations.
  - Elections in the Code (with deadlines).
  - Elections in the Code (without deadlines, set by Regulations or other administrative guidance).
  - Elections in the Regulations.
- A missed election can happen, and, without the possibility of fixing it, required elections can lead to undesired outcomes.

# Discovering Missed Elections

Missed elections can be discovered during:

- The preparation of the affected return or a future return.
- A financial audit.
- IRS audit.
- Diligence for a subsequent transaction.
- Administration of an estate or trust.

# What Qualifies as an “Election” Under Treas. Reg. § 301.9100-1(b)?

- Generally, it is a request to adopt, change, or retain an accounting method or accounting period; but does not include an application for an extension of time for filing a return under § 6081.
- An election can include
  - an application for relief in respect of tax.
  - a request to adopt, change, or retain an accounting method or accounting period; but does not include an application for an extension of time for filing a return under § 6081.
- A regulatory election is an election whose due date is prescribed by a regulation published in the Federal Register, or a revenue ruling, revenue procedure, notice, or announcement published in the IRB.
- A statutory election is an election whose due date is prescribed by statute.

# 9100 Relief Overview

# 9100 Relief

- § 301.9100-2 provides for automatic 12-month extensions (for certain regulatory elections) and automatic 6-month extensions (for certain regulatory and statutory elections).
  - automatic 12-month extensions (for certain regulatory elections) and
  - automatic 6-month extensions (for certain regulatory and statutory elections).
- § 301.9100-3 provides for extensions of regulatory elections in certain other cases (non-automatic).
- The granting of an extension is not a determination that the taxpayer is eligible to make the election. See §301.9100-1(a).

# 9100 Relief Generally

- Treas. Reg. §§ 301.9100-1, 2 and 3 are equitable provisions that allow taxpayer an extension of time to make an election.
  - Treas. Reg. § 301.9100-1(c) - IRS discretion to grant a reasonable extension of time for making an election.
  - Treas. Reg. § 301.9100-2 – allows for automatic extensions of time for regulatory and statutory elections.
  - Treas. Reg. § 301.9100-3 – allows for non-automatic extensions of time for regulatory elections that do not meet the requirements of Treas. Reg. § 301.9100-2 (often what is meant by “9100 Relief”).
- No corresponding IRC section exists.
- Specific relief for certain elections may be available.

# Automatic Extensions Treas. Reg. § 301.9100-2

- 12-month automatic extension for regulatory elections (Treas. Reg. § 301.9100-2(a)) with 9 specific regulatory elections eligible.
  - Taxpayer required to take “corrective action” within the 12-month extension period, which runs from the due date of the election (including extensions if applicable).
- 6-month automatic extension for statutory and regulatory elections required to be made by the due date of the return (including extensions) (Treas. Reg. § 301.9100-2(b)).
  - Taxpayer must have timely filed the return for the year in which the election should have been made and must take “corrective action.”
  - 6-month window starts from due date of return, excluding extensions.
  - Does not apply to elections that must be made by the due date of the return excluding extensions.
- No ruling request requirement; notation on election sufficient.

# Automatic 12-Month Extension

## Nine Regulatory Elections Eligible for Automatic 12-Month Extension:

- To use other than the required taxable year under § 444;
- To use the last-in, first-out (LIFO) inventory method under § 472;
- The 15-month rule for filing an exemption application for a §§ 501(c)(9), 501(c)(17), or 501(c)(20) organization under § 505;
- The 15-month rule for filing an exemption application for a § 501(c)(3) organization under § 528;

# Automatic 12-Month Extension *(Cont.)*

- To be treated as a homeowners association under § 528;
  - To adjust basis on partnership transfers and distributions under § 754;
  - To specially value qualified real property (where the IRS has not yet begun an examination of the filed return) under § 2032A(d)(1);
  - To treat a qualified payment right as other than a qualified payment under § 2701(c)(3)(C)(i); and
  - To treat any distribution right as a qualified payment under § 2701(c)(3)(C)(ii).
- § 301.9100-2(a)(2).

# Automatic 6-Month Extension

- For regulatory and statutory elections that are not one of the elections eligible for the automatic 12-month extension. See § 301.9100-2(b).
- To be eligible,
  - (1) the due date of the election must be the due date of the return, including extensions; and
  - (2) the taxpayer must have timely filed the original return.
- The automatic 6-month extension does not apply when the election must be made by the due date of the return, excluding extensions.

# Corrective Action Defined

- To obtain an automatic 12-month or 6-month extension, the taxpayer must take corrective action within either 12 months or 6 months, as applicable, of the deadline for the return, including extensions.
- See § 301.9100-2(c).
- For an election required to be filed with a return, corrective action includes filing an original or amended return for the year in which election should have been made, and attaching the appropriate form or statement for making the election with:  
“FILED PURSUANT TO § 301.9100-2” across the top of document. See § 301.9100-2(d).
- For example regarding Corrective Action for Missed 754 Election: Filing amended return with written statement attached within 12 months of the deadline for the return, including extensions.

# Extensions under § 301.9100-3

- If the deadline for filing for an automatic extension for a REGULATORY election has passed, taxpayer may request 9100 relief (with exceptions).
- The IRS does not have authority to grant 9100 relief for statutory elections that do not meet the requirements for the automatic 6-month extension.

## Requirements for Extension under § 301.9100-3:

- The 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 government.
- If both requirements are met, relief must be granted. See § 301.9100-3(a).

# Relief “Outside” of 9100

- Rev. Proc. 2009-41 – Certain Late Check-the-Box Elections.
- Rev. Proc. 2010-32 – Certain Late Check-the-Box Elections.
- Rev. Proc. 2003-33 - Sec. 338 Elections.
- Rev. Proc. 2013-30 - S Corp Elections.
- Rev. Proc. 2013-30 - S Corp and Q Sub Elections.
- Rev. Proc. 2008-27 - Late FIRPTA Certifications.
- Treas. Reg. § 1.367(a)-8(p) and IRS Directive – GRAs.

# 9100 Relief Not Available

- Relief under the 9100 regs is not available where alternative relief is provided by a statute, a regulation published in the Federal Register, or a revenue ruling, revenue procedure, notice, or announcement published in the IRB. (Treas. Reg. § 301.9100-1(d)(2) ).
- Examples:
  - § 469 - reporting groupings and regroupings of activities and the addition of specific activities within their existing groupings of activities; Treas. Reg. § 1.469-4 provides Taxpayers must comply with disclosure requirements that the Commissioner may prescribe; Rev. Proc. 2010-13 provides the disclosures and due date and alternative relief for untimely filing.
  - § 367(a) - filing gain recognition agreements; Treas. Reg. § 1.367(a)-8(p) provides alternative relief for untimely filing; TAM 200919032 concludes that the alternative relief renders 9100 relief inapplicable.

# 9100 Relief Not Available (*cont.*)

- Examples:

- § 721(c) - US transferor reporting for outbound transfers of property; Treas. Reg. § 1.721(c)-6 provides due date and alternative relief for untimely filing.
- Treas. Reg. § 301.7701-3(a) entity classification election that would override Treas. Reg. § 301.7701-3(c)(1)(iv) 60-month limitation (PLR202123001).
- § 1295 - QEF Election ; Treas. Reg. §1.1295-3 provides that it provides the exclusive rules under which a shareholder may make a § 1295 election for a taxable year after the election due date (compare to § 1296 MTM election).
- § 2010(c)(5)(A) - Unified Credit Against Estate Tax; Treas. Reg § 20.2010-2(a)(1) provides that 9100 relief not available to an estate that is required to file a return.
- Consider § 1411/ § 6013(g) or 6013(h) election for dual status individual to file joint returns; Treas. Reg. § 1.1411-2 (a)(2) provides due date and relief procedures for untimely filing.

# 9100 Relief Not Available *(cont.)*

- Statutory Elections

- § 645(c) election to treat certain qualifying revocable trusts as part of decedent's estate.
- § 2523(f)(4)(A) – QTIP election for inter vivos transfer (compare to § 2056(b)(7) estate tax QTIP election).
- § 6015(b)(1)(E) – Election to obtain benefits of “innocent spouse” relief.
- § 6166(d) and (h) – Election to pay in installments the estate tax and deficiency imposed on the value of certain qualifying estates.

# Non-Automatic Extensions

## Treas. Reg. § 301.9100-3

- Available for regulatory elections that do not meet the requirements for an automatic extension.
- 9100 Relief (extension) granted if the taxpayer provides evidence that establishes that:
  - The taxpayer acted reasonably and in good faith.
  - Granting relief will not prejudice the interests of the government.
- A letter ruling request (Rev. Proc. 2022-1) must be used to request 9100 Relief.
- Additional requirement (Treas. Reg. § 301.9100-3(e)):
  - Taxpayer affidavit explaining the events leading to the failure to make the election and the discovery of the failure.
  - Affidavits from other individuals (including advisors) who know about the events leading to the failure to make the election and discovery thereof.
  - Additional requirements for “reliance on a qualified tax professional” to show reasonable action and good faith.

# Reasonable Action and Good Faith

## Treas. Reg. § 301.9100-3(b)

A taxpayer will be treated as acting reasonably and in good faith if:

- The taxpayer applies for an extension before the IRS discovers the failure to make the election;
- Intervening events beyond the taxpayer's control caused the taxpayer to fail to make the election;
- After exercising reasonable diligence, the taxpayer did not realize that an election was necessary;
- The taxpayer relied on the written advice of the IRS; or
- The taxpayer relied on a qualified tax professional who failed to make, or advise the taxpayer to make, the election.

# Situations Where Taxpayer Deemed Not to Have “Acted Reasonably and in Good Faith”

- The taxpayer seeks to alter a return position for which an accuracy-related penalty either has been or could have been imposed under § 6662 at the time the taxpayer requests relief, and the new position requires or permits a regulatory election for which relief is requested;
- The taxpayer was informed in all material respects of the required election and related to tax consequences, but chose not to file the election; or
- The taxpayer uses hindsight in requesting relief.
- § 301.9100-3(b)(3).

# Prejudice to the Interests of the Government

## Treas. Reg. § 301.9100-3(c)

- The government's interests are prejudiced if:
  - Granting relief would result in a taxpayer having a lower tax liability for the years to which the election applies “than the taxpayer would have had if the election had been timely made (taking into account the time value of money).”
  - The statute of limitations under I.R.C. § 6501 has expired.
- If a year is closed, the IRS may still grant relief, but may condition relief on the taxpayer providing a written statement from an auditor certifying that the government's interests are not prejudiced under the lower tax liability standard.
- Special rules for accounting method regulatory elections.

# Higher Standard for Change in Accounting Methods or Tax Years

- The government is deemed to be prejudiced on late change of accounting method or tax years unless there are “unusual and compelling circumstances.”
- § 301.9100-3(c)(2), (3).

# Procedures for Requesting Relief

- Request for 9100-3 relief is a request for a letter ruling; see Rev. Proc. 2022-1 and § 301.9100-3(e) for detailed requirements.
- Request must include:
  - Affidavit from the taxpayer describing reason for missed election and the discovery of the failure.
  - When claiming reliance, the affidavit must describe engagement and responsibilities of the professional and extent of reliance.
  - Affidavit from individuals with knowledge of the events, including return preparer, and any accountant or lawyer who advised the taxpayer with respect to the election.

# Affidavit from Accountant/Lawyer

- Where a taxpayer hired a qualified tax professional who failed to advise him that a particular election was necessary, assuming all other criteria are satisfied, the IRS will grant the election if the professional submits an affidavit stating that he or she failed to advise the taxpayer that the election was necessary.
- § 301.9100-3(f).

# Review of Denial of 9100 Relief Possible?

- No stand-alone review of the denial; the taxpayer can challenge the denial in later deficiency procedures.

# Can a Taxpayer Raise 9100 Relief for the First Time During Deficiency Procedures?

- In Tax Court? Unclear whether a taxpayer is permitted as a procedural matter from raising 9100 for the first time in Petition, but, as a practical matter, the taxpayer would not be eligible for 9100 relief because there would be hindsight. *Perkins v. Comm'r*, 129 T.C. 58, 68 (2007); *Lehrer v. Comm'r*, T.C. Memo. 2005-267.
- In Refund Litigation? No; substantial variance doctrine applies unless taxpayer either requested 9100 relief or otherwise tried to make election on amended return. *Marandola v. United States*, 76 Fed. Cl. 237 (2007).

# Issues in Practice

# In Practice: Reliance on a Qualified Tax Professional

- In general, 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” (Treas. Reg. § 301.9100-3(b)(1)(v)).
- This rule does not apply if the taxpayer knew or should have known that the tax professional was not competent to render advice on the regulatory election or was not aware of all relevant facts.
- No definition of “qualified tax professional.”
- What is reasonable reliance?

# In Practice: Hindsight

- In general, a taxpayer is deemed to have not acted reasonably or in good faith if the taxpayer “[u]ses hindsight in requesting relief” (Treas. Reg. § 301.9100-3(b)(3)(iii)).
  - Hindsight exists when “specific facts have changed since the due date for making the election that make the election advantageous to a taxpayer.”
  - If hindsight exists, “the IRS will grant relief only when the taxpayer provides strong proof that the taxpayer's decision to seek relief did not involve hindsight.”
- IRC § 475 (mark to market) cases: *Vines v. Comm.* (“the relevant inquiry is whether allowing a late election gives the taxpayer some advantage that was not available on the due date”), (*Acar*, *Kohli*, etc.).

# In Practice: As-If Returns

- Grant of relief impacts unfiled year.
- Practical considerations:
  - Can you get relief in time? Expedited relief generally not available. Extend as long as possible.
  - What is your likelihood of success?
- Appropriate position to take on return:
  - File consistently with desired relief or consistently with status quo?
  - While 9100 is pending?
  - If 9100 is intended but not yet filed?
  - What if you end up withdrawing the request?
- Penalty exposure.
- Disclosure required?

# In Practice: Dover Situations

- Does the IRS consider the underlying transaction or viability of the election when ruling?
  - *Dover v. Commissioner*, 122 T.C. 324 (2004), Commissioner granted relief without ruling on whether election would have desired effect, an issue later litigated.
- Can the IRS deny relief based upon the substance of the transaction?
  - *Vines v. Commissioner*, 126 T.C. 279 (2006), holding that the Commissioner must grant relief if the regulatory requirements of 9100 are satisfied.
- Boilerplate language expressly limits PLR, excluding rulings on federal tax consequences of the transaction or “item.”

# In Practice: Closed/Closing Years

- The Government's interests are “ordinarily prejudiced” if “the taxable year in which 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...before the taxpayer's receipt of a ruling granting relief under this section” (Treas. Reg. § 301.9100-3(c) (1)(ii)).
- Uneven treatment of issue at the various Associate Chief Counsel offices.
- How do you extend statute of limitations on assessment if taxpayer is not under audit?
- Late QEF election requests – if it would result in lower tax liability, can enter into closing agreement to pay an amount necessary to eliminate any prejudice

# In Practice: Can 9100 Relief Be Used to Revoke an Election

- For purposes of 9100 Relief, “election” is defined broadly to include “an application for relief in respect of tax” (Treas. Reg. § 301.9100-1(b)).
- Taxpayer deemed to have not acted reasonably and in good faith if the taxpayer “was informed in all material respects of the required election and related tax consequences, but chose not to file the election” (Treas. Reg. § 301.9100-1(b)(3)(ii)).
- What if
  - Election made, but the taxpayer had an erroneous understanding of the underlying facts.
  - Election made, but the taxpayer was not well-advised.
  - See PLR 200626026 (revocation of §163(d)(4)(B)(iii) election) and PLR 200303013 and PLR 200146018 (revocation of §163(d)(4)(B)(iii) election).
  - Election made as intended, but the taxpayer later determines that the election should not have been made.
  - Revocation of election permitted (IRS consent may be required), but taxpayer failed to revoke the election timely.

# In Practice: Consistency Between Associate Offices

- Interpretation of “reasonable action and in good faith.”
  - How many of the factors identified in the regulations must be demonstrated?
  - Are certain factors given greater weight than others?
  - Required representations.
- Administrative Matters.
  - Statute extensions.
  - Original signatures required on submission documents.
  - Affidavits and declarations from other parties.
  - Internal checklists.

# In Practice: Elections with Both Statutory and Regulatory Due Dates

- Sec. 172(b)(1) - Election to Relinquish Carryback Period.
- Sec. 172(b)(1)(H) - Extended NOL Carryback Election.
  - Regulatory due date found in consolidated return regulations.
- Sec. 1502 - Consolidated Return Election.
- Sec. 338(g) - Election to Treat Stock Purchase as Asset Acquisition.

# In Practice: Is 9100 Relief Even Needed?

- IRC § 851(b)(1) (RIC elections) - Corporation not considered a RIC unless “it files with its return for the taxable year an election to be a regulated investment company or has made such election for a previous taxable year.”
  - Treas. Reg. § 1.851-2(a) - “The election shall be made...by computing taxable income as a [RIC] in its return for the first taxable year for which the election is applicable”
- Treas. Reg. § 25.2701-2(c)(5) (2701 Elections) - Election made “by attaching a statement to the [gift tax return] on which the transfer is reported.”
  - PLR 200839029 - Election on an amended return valid provided that the amended return is the first return reporting the transfer.

# Non-Automatic Relief Outside of 9100 – What's the Standard?

- 9100 Relief - Taxpayer must show that it “acted reasonably and in good faith.”
  - This can require nothing more than requesting relief before the IRS begins an audit and establishing through affidavits that the taxpayer had not previously made an informed decision to not make the election.
- Other forms of relief outside of 9100 Relief - taxpayer may be required to show that the failure was due to “reasonable cause” (and not willful neglect).
  - Treas. Reg. § 1.1503(d)-1(c)(1) (DCL) - “in general, the taxpayer must demonstrate that it exercised ordinary care and prudence in meeting its tax obligations but nonetheless did not comply with the prescribed duty within the prescribed time.”
  - Treas. Reg. § 1.367(a)-8 (GRA) - “whether the failure was due to reasonable cause and not willful neglect will be determined by the Director after considering all the facts and circumstances.”

# No Relief

For some elections, no administrative relief is possible:

- 83(b).

# Conclusion

# About Megan L. Jones



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**Megan L. Jones** is a tax attorney who focuses her practice on advising entities, individuals and family offices on tax and other planning matters, both domestically and internationally. Along with corporate work, Megan's practice includes personal estate planning and family succession planning. She works with clients of modest size, as well as those with complex estates and investment holdings.

Megan frequently advises foreign individuals and companies moving to the U.S. on pre-immigration, structural and tax issues, and helps those leaving the United States or California. Having a corporate background, she also assists clients in tax and corporate planning relating to entity formation and the acquisition, disposition and restructuring of businesses, corporations and partnerships.

She is also an adjunct professor at the USC Gould School of Law, teaching International Business Transactions.

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**Pamela Drucker** is a Partner in the West Los Angeles office of Armanino LLP, Pam Drucker has over 20 years of experience advising clients on international tax matters. Her clients have included closely-held businesses, middle-market companies and high net worth individuals.

Pam's practice covers a full-range of domestic and international transactions, including: inbound and outbound international structuring and compliance; income and estate tax planning for inbound investments in U.S. real estate; U.S. withholding tax matters; cross-border structuring and U.S. tax compliance issues for film finance and production companies; planning and compliance for pre-immigration, expatriation and multi-jurisdictional families with U.S. connections, including foreign trusts with U.S. beneficiaries; and income tax treaty analysis.