



# How do you spell relief? Resolving IRS issues before they become IRS problems

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# Today's Speakers



**Patti Burquest**  
Principal  
Washington National Tax  
patti.burquest@mcgladrey.com



**David Click**  
Director  
Denver, Colo.  
david.click@mcgladrey.com



**Natalie Tucker**  
Director  
Washington National Tax  
natalie.tucker@mcgladrey.com

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# **EIN issues after corporate transactions**

# Common scenarios

- Corporate restructurings involving change of name or place of incorporation
- C or S corporation conversion to LLC
- Transfer of partnership or LLC interests to single partner or LLC
- New entity wants to continue payroll filings, bank accounts and government contracts of old entity and continues the business under a new name or place of incorporation

# Obtain IRS 147C letter

- Request issuance of a 147C letter which provides that the new entity is assigned the EIN of the old entity for all IRS purposes
- The 147C letter has many purposes, including:
  - Informing contracting parties of the continuation of the EIN
  - Clarifying the status of an entity as a single member LLC or partnership
  - Verifying name, address and EIN of a taxpayer
  - Effective date of entity elections

# Entity classification challenges

- Change of status from a single member LLC to multi-member LLC results in classification as a partnership unless a check the box election is made by filing Form 8832
- C or S corporation conversion to LLC may change the status unless a check the box election is made by filing Form 8832
- Late elections:
  - Rev. Proc. 2009-41
  - Rev. Proc. 2010-32

**9100 relief for missed elections  
and late accounting method  
changes**



# Missed an election?

- Tax law is littered with a multitude of elections, each with its own due date and rules
- There is a high likelihood that a taxpayer will inadvertently miss an election or due date
- Common errors include:
  - Missed S corporation elections
  - Entity classification elections
  - Section 338 elections
  - QSub elections

# Missed an election? (cont.)

- The Commissioner has discretion to grant an extension of time to make elections after the prescribed due date
- Reg. section 301.9100 allows the Commissioner to grant relief and provides an automatic extension for some regulatory and statutory elections

# Automatic extensions

- Reg. section 301.9100-2 allows an automatic extension for elections provided corrective action is taken
- 12 month extension—automatic extension of 12 months after the due date of the return to make an election; applies only to specific elections, including:
  - Taxable year under section 444
  - LIFO inventory method under section 472
  - Exemption application for certain 501 organizations (15 months)
  - Partnership transfers under section 754
- Six-month extension—elections that should be filed with the tax return have an automatic extension of six months provided the original return was timely filed and corrective action has been taken. Does not apply to regulatory or statutory elections that must be made by the due date of the return excluding extensions

# Automatic extensions (cont.)

- Corrective action—to qualify for an automatic extension the taxpayer must take steps to file the required election on an original or amended return and must file their returns in a manner consistent with the election
- Procedural requirements—file the return, statement of election or other form of filing with the statement: “FILED PURSUANT TO SEC. 301.9100-2.” No need to request a letter ruling and no user fee

# Non-automatic extensions

- If you don't qualify for an automatic extension to make an election, Reg. section 301.9100-3 provides procedures for requesting "9100" relief from the IRS
- Obtaining relief is similar to obtaining a private letter ruling (PLR)

# Non-automatic extensions (cont.)

- Requirements to obtain 9100 relief
- Reasonable action and good faith—was the election missed because:
  - Intervening events prevented a timely election?
  - After reasonable diligence—was unaware that election was due?
  - Reasonably relied on written IRS advice?
  - Reasonably relied on a qualified tax professional?
- Prejudice to the interest of the government—relief will not be granted if the interests of the government are adversely affected
  - Is there a reduction in the tax liability of the taxpayer?
  - Is the IRS in a “whipsaw” position?
  - Will the election affect closed tax years?
- Affidavit from taxpayer—statement on events that led to the missed election and discovery of the failure. May need affidavits from other parties
- Is the taxpayer under examination?

# Other procedural requirements

- Submitting a 9100 relief request falls under the procedural requirements of Rev. Proc. 2013-1
- Rev. Proc. 2013-1 contains extremely detailed guidance on submitting a ruling request. Some important points:
  - Section 3 provides a list of issues on which the IRS will issue rulings
  - Section 5.03 specifically addresses 9100 relief
  - Section 7 has general instructions for requesting a ruling
  - Detailed checklist (found in Appendix C) must be included in request
- User fee for 9100 relief—\$10,000

# Obtaining relief for a missed election

- Granting relief is at the discretion of the Commissioner—if denied, very limited review
- Changes in accounting methods have specific procedures—we'll discuss later
- Commissioner has discretion to grant relief where the election is set by the Commissioner in regulations, revenue rulings or other guidance
- Statutory elections may qualify for six-month extensions, but some statutory elections cannot be waived by the Commissioner
- Some elections are fixed and not subject to 9100 relief—for example, section 41(c)(5)(C)



# IRS determination letters

# What is a determination letter?

- A written determination issued by an Industry Director that applies the principles and precedents previously announced by the IRS to a specific set of facts
  - Can apply a statute, tax treaty, regulation, conclusion in a revenue ruling, or an opinion or court decision that represents the position of the IRS
- Issued by the field organization: LB&I, SB/SE, TE/GE, W&I
- User fee: \$275

# Recent procedure change relating to missed Form 1122 (subsidiary consent)

- A common missed filing is the Form 1122 (authorization and consent of a subsidiary to be included in a consolidated income tax return)
  - Required for the first tax year a subsidiary consents to be included in a group's consolidated return
  - Historically, required either a 9100 ruling request or a private letter ruling request under Reg. section 1.1502-75(b)(2)
  - If the three requirements of the regulation are met, a determination letter can be issued by the IRS field organization
  - Application (similar to a ruling request) is sent to the Office of Prefiling & Technical Guidance in Washington and then is assigned to the field

# **Penalty relief for certain unfiled returns**

# International-related information return penalties

- Forms 5471, 5472, 8865, 8858, 8938 (information returns of U.S. persons regarding foreign corporations, partnerships, disregarded entities, or specified foreign assets)
  - \$10,000 per form plus potential FTC reduction
  - Additional per-month penalties
  - Reasonable cause defense
- Form 926 (reporting transfers of property to a foreign corporation)
  - 10 percent of the FMV of the transferred property up to a maximum of \$100,000 unless failure to file is due to intentional disregard
  - Reasonable cause defense

# Typical and troublesome penalty scenarios

1. Form 5471 is omitted from the Form 1120 and later discovered to be required
2. Form 5471 was timely filed, but later discovered to be incomplete
3. Unfiled FBAR forms, but all income reported on return
4. Unfiled Forms 926, 3520, 3520A, 8865, 8858, but U.S. income has been properly recorded on U.S. return

# FAQ 17 and 18 of the Offshore Voluntary Compliance Program (OVDP)

- FAQs are posted on the IRS website under the OVDP
  - Must follow the instructions for filing
    - Legend Return
    - Certain forms, file with amended return
    - Statement that all income has been reported
    - Not under IRS exam or discovered by IRS
  - Penalties for late filing can be waived

# Seeking abatement or waiver

- If relief is denied after filing under the FAQs, the denial can be appealed to the service center “penalty appeals coordinator”
- If the penalty appeals coordinator denies relief, can appeal the denial to appeals
- Under any scenario, can pay the penalty and sue for refund



**Relief provided by accounting  
method changes**

# Adopting an accounting method

- Method generally adopted for:
  - Each item
  - Within each trade or business (section 446(d))
  - Within each legal entity (Reg. section 1.1502-17)
- Method generally adopted if:
  - Proper and used in a single return, or
  - Erroneous and consistently used in at least two consecutive returns (Rev. Rul. 90-38)
- Foreign taxpayer adopts a new method for the first taxable year in which the method is “significant” for E&P purposes (Reg. section 1.964-1(c))
- Correction of an error, change in fact or change in character is NOT a change in method

# Types of accounting method changes

- Voluntary changes
- Statutorily mandated changes
- Method changes due to section 381 transactions (reorganizations)
- Involuntary changes
- Unauthorized changes

# Voluntary changes

- Rev. Proc. 97-27 (non-automatic) and Rev. Proc. 2011-14 (automatic)
  - Encourage taxpayers to change from impermissible methods PRIOR to getting contacted by IRS for an exam
  - More favorable terms and conditions generally received if erroneous method is voluntarily corrected BEFORE issue is raised on exam

# Voluntary changes (cont.)

- Favorable terms and conditions:
  - Prospective year of change
  - Spread of taxpayer-unfavorable section 481(a) adjustment over four tax years and taxpayer-favorable section 481(a) adjustment over one tax year
    - Cut-off in certain circumstances (e.g., changes within LIFO)
  - No interest and penalties
  - Audit protection generally prevents IRS from raising the same accounting method issue in a year prior to the year of change

# Voluntary changes (cont.)

Automatic	Non-automatic
Rev. Proc. 2011-14, as modified by Rev. Proc. 2012-39	Rev. Proc. 97-27, as modified by Rev. Proc. 2011-14, as modified by Rev. Proc. 2012-39
Due with original timely filed tax return (including extensions)	Due by end of tax year of change
No user fee	\$7,000 user fee (plus \$150 for each additional entity)
File original with return; duplicate copy with either IRS National Office or Ogden, UT Service Center*	File original with IRS National Office
§481(a) adjustment spread period – 1 year favorable 4 years unfavorable**	

\*Applicable appendix section will specify if duplicate or triplicate copy to be sent to Ogden, UT, or if an election statement is allowed in lieu of a Form 3115

\*\*1 year if elect for adjustment < \$25,000, or in case of cooperative

# Automatic extension of time to file automatic Form 3115

- Six months from due date of return for year of change (excluding extensions)
  - Must have timely filed (including extensions) tax return for year of change
  - Must file amended return within six-month extension period and include Form 3115 with amended return
  - Must file copy of Form 3115 with IRS National Office
  - Write at top of application “Filed Pursuant to Reg. section 301.9100-2”

# Filing an automatic Form 3115 with a superseding return

- May file an automatic Form 3115 with a return that has already been filed before the extended due date of the return if extended
- A subsequent return filed within the filing period (including extensions) is considered a superseding return
- Considered the original filing
  - Takes the place of any other return previously filed during the filing period, with extensions
- Includes amendments filed within the time for filing original returns as extended



# Other extension of time to file Form 3115

- Beyond six-month extension period—only in cases of “unusual and compelling circumstances”
  - User fee for extension request is \$8,000 (App. A of Rev. Proc. 2013-1)

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