



Agricultural Law Press

Publisher/Editor

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Issue Contents

Bankruptcy

General

Automatic stay **163**

Chapter 12

Conversion **163**

Federal Farm Programs

Biomass Crop Assistance program **163**

Crop Assistance program **163**

Federal Estate and Gift Taxation

GSTT **163**

Gifts **163**

Federal Income Taxation

Alimony **164**

Cellulosic biofuel producer credit **164**

Charitable contributions **164**

Disaster losses **164**

Domestic production deduction **164**

Filing status **164**

Home office **164**

Housing credit **164**

Income **165**

Inflation-adjusted items **165**

IRA **165**

Installment reporting **165**

Investment income **166**

Legal expenses **166**

Passive activity losses **166**

Pension plans **166**

Safe harbor interest rates

November 2010 **166**

Tax return preparers **166**

Voluntary payment of back taxes **167**

Withholding taxes **167**

Negligence

Duty of care to invitees **167**

Landlord and Tenant

Death of tenant **167**

Agricultural Law Digest

Volume 21, No. 21

November 5, 2010

ISSN 1051-2780

Making Section 179 Elections-One More Time

-by Neil E. Harl*

As we have discussed before,¹ Section 179 elections cannot be made on amended returns for taxable years beginning after December 31, 2007, without the Commissioner's consent.² The Department of the Treasury has had the authority to allow late elections but has failed to publish regulations permitting that to be done.³ The extension of time by one year (through 2011) for taxpayers to *revoke* Section 179 elections⁴ without changing the rules *for* late elections has provided further evidence that late elections still cannot be made without the Commissioner's consent.

History of the controversy

Elections. The permanent rule was (and still is) that an *election* to claim expense method depreciation could only be made without the consent of the Commissioner on the original return for the year (whether or not timely filed) or on an amended return if filed within the time for filing a return (including extensions) for the taxable year.⁵ However, for taxable years beginning after 2002 and before 2008, a taxpayer was permitted by regulation to make an expense method depreciation election on an amended federal income tax return without the consent of the Commissioner.⁶ The statute has long specified that

"... elections may be made in such manner as the Secretary may *by regulations* prescribe."⁷

The Department of the Treasury on December 26, 2006, made an attempt to solve the problem of late elections by stating –

"For a taxable year beginning after 2002 and before 2010, a Taxpayer may make a section 179 election by filing an amended return."⁸

The problem with that pronouncement was that it appeared in the "Explanation of Provisions" section of the Treasury Decision (and apparently was in response to a question raised in the hearing on the Treasury Decision) and the Treasury Decision *did not amend the relevant regulations*.⁹ The Department of the Treasury, to date, has not exercised its authority *in regulations* to extend the right to make elections beyond 2007.

In 2008, the Internal Revenue Service (not the Department of the Treasury) issued *Rev. Proc. 2008-54*¹⁰ announcing that the Department of the Treasury "intended" to amend the regulations¹¹ to permit taxpayers to make an election to claim expense method depreciation

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without the consent of the Commissioner for taxable years beginning after 2007 and “. . . before the last year provided in section 179(c)(2) for revoking a § 179 election.”¹² That has appeared to state that the authority would run through a year before the end of 2010 inasmuch as the statute states that the authority to revoke without consent at that time was effective for taxable years beginning “before 2011.”¹³ Thus, the message in *Rev. Proc. 2008-54*¹⁴ would run through 2009, even though the statutory authority for revocations ran through 2010 at that time. Of course, it is clear that *Rev. Proc. 2008-54*¹⁵ only indicated an “intent” for regulations to be issued and that statement was by IRS which does not have authority to speak for the Department of the Treasury, its parent organization.

Revocations. Revocations, on the other hand, have been governed by a series of statutory enactments which, after the 2010 amendment¹⁶ provide authority to revoke Section 179 elections through 2011 without Commissioner consent.¹⁷

Effect of the 2010 amendment

By extending the period for revocations through 2011 and leaving the rules for late elections unchanged, Congress signaled that it was satisfied with the rules in place for elections with the Department of the Treasury having clear authority to change the rules for elections *by regulation* if Treasury saw fit. Congress could easily have retaken the authority from Treasury and set new rules for elections which it did not do. Moreover, what limited authority could be derived from *Rev. Proc. 2008-54*¹⁸ (because IRS lacked authority to issue such a statement) appears to have evaporated at the end of 2009.

In conclusion

By statutory authority, revocations can be made by the taxpayer without Commissioner consent through 2011.¹⁹ For elections, on the other hand, taxpayers have been unable to elect Section 179 depreciation on amended returns filed after the time for filing the return (including extensions) for the taxable year in question after 2007 without Commissioner consent.²⁰

ENDNOTES

¹ See Harl, “IRS Says Amendment to Regulations Needed for Late Section 179 Elections on Amended returns After 2007,” 19 *Agric. L. Dig.* 141 (2008); Harl, “Can Section 179 Elections Be Made on Amended Returns After 2007?” 18 *Agric. L. Dig.* 161 (2007). See generally 4 Harl, *Agricultural Law* § 29.05[2][b][v] (2010); Harl, *Agricultural Law Manual* § 4.03[4][j] (2010); 1 Harl, *Farm Income Tax Manual* § 3.20[2][b][iii] (2010 ed.).

² I.R.C. § 179(c)(1).

³ *Id.*

⁴ See the Small Business Jobs Act of 2010, Pub. L. No. 111-240, 111th Cong., 2d Sess. (2010), amending I.R.C. § 179(c)(2).

⁵ Treas. Reg. § 1.179-5(a). See, e.g., *Patton v. Comm’r*, 116

T.C. 206 (2001).

⁶ Treas. Reg. § 1.179-5(c).

⁷ I.R.C. § 179(c)(1) (emphasis added).

⁸ T.D. 9307, 2007-1 C.B. 470.

⁹ See Treas. Reg. § 1.179-5(c).

¹⁰ 2008-2 C.B. 722.

¹¹ Treas. Reg. § 1.179-5(c).

¹² *Rev. Proc. 2008-54*, 2008-2 C.B. 722.

¹³ I.R.C. § 179(c)(2).

¹⁴ 2008-2 C.B. 722.

¹⁵ 2008-2 C.B. 722.

¹⁶ See note 4 *supra*.

¹⁷ I.R.C. § 179(c)(2).

¹⁸ 2008-2 C.B. 722.

¹⁹ See note 4 and accompanying text *supra*.

²⁰ Treas. Reg. § 1.179-5(c).

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