

2008-09-12

IRS Says Amendment to Regulations Needed for Late Section 179 Elections on Amended Returns After 2007

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Agricultural Law Press

Publisher/Editor

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Issue Contents

Bankruptcy

General

Discharge **143**

Federal Agricultural Programs

Brucellosis **143**

Country of origin labeling **143**

Downer cattle **143**

Fees **143**

Karnal bunt **143**

Mad Cow disease **143**

Federal Estate and Gift Taxation

Charitable deduction **144**

Distributions **144**

GSTT **144**

Marital deduction **144**

Terrorist victims **144**

Federal Income Taxation

Accounting method **144**

Alimony **144**

Alternative motor vehicle credit **144**

Business expenses **145**

Cooperative **145**

Court awards and settlements **145**

Dependents **145**

Depreciation **145**

Disaster losses **145**

Employee benefits **145**

Energy credit **145**

Hobby losses **145**

Income averaging **146**

IRA **146**

Innocent spouse **146**

Interest rate **146**

Partnerships

Election to adjust basis **146**

Passive activity losses **146**

Pension plans **146**

Restitution **146**

Returns **146**

Self-employment taxes **147**

Tax scams **147**

Travel expenses **147**

Unenrolled agents **147**

In the News 147

Agricultural Law Digest

Volume 19, No. 18

September 12, 2008

ISSN 1051-2780

IRS Says Amendments to Regulations Needed for Late Section 179 Elections on Amended Returns After 2007

-by Neil E. Harl*

Although some commentators argued to the contrary, the Internal Revenue Service in a Revenue Procedure issued in late August of 2008¹ acknowledged that Section 179 elections² could not be made on amended returns for taxable years beginning after December 31, 2007, without the Commissioner's consent.³ The Revenue Procedure announced that *amendments to the regulations would need to be made resolving the problem*,⁴ provided guidance on the rules applicable to the 50 percent bonus depreciation for 2008⁵ and provided further guidance on depreciation allowances claimable with respect to the Kansas Disaster Area Recovery Assistance Property and GO Zone property.⁶

The amended return election issue

The permanent rule for elections to claim expense method depreciation for many years has been that elections had to be made on the original income tax return for the year the property was placed in service (whether or not the return was timely) or on an amended return but only if filed within the time for filing a return (including extensions) for the taxable year.⁷ For taxable years beginning after 2002 and before 2008, a taxpayer was permitted to make an expense method depreciation election on an amended federal income tax return without the consent of the Commissioner.⁸ The amended return had to be filed within the time prescribed for filing an amended return for the taxable year.⁹ Confusion had arisen because the time to *revoke* an election had been extended to taxable years before 2011 without IRS consent, provided the period for filing the amended return had not expired.¹⁰

The statute has always been clear on the authority to *revoke* without the Commissioner's consent –

“Any elections made under this section, and any specification contained in such election, may not be revoked except with the consent of the Secretary. Any such election or specification with respect to any taxable year beginning after 2002 and before 2011 may be revoked by the taxpayer with respect to any property, and such revocation, once made, shall be irrevocable.”¹¹

The problem was that the statute was amended in 2006¹² to extend the period for

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revocations to be made on an amended return before 2010 *but that legislation did not extend the period for making elections on an amended return.*¹³ The statute was amended again in 2007 to extend the date to “before 2011” for revocations without the Commissioner’s consent, but again without extending the period for *making* elections.¹⁴

Earlier attempt at a solution

Inasmuch as the statute states that “. . . elections shall be made in such manner as the Secretary may *by regulations* prescribe,¹⁵ any solution short of a statutory amendment had to come in the form of an amendment to the regulations (which is clearly within the authority of the Department of the Treasury). The Treasury had made an attempt to solve the problem in T.D. 9307¹⁶ on December 26, 2006, 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.”¹⁷

The problem with that pronouncement was that the statement quoted above 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 T.D.) and the Treasury Decision *did not amend the relevant regulations.*¹⁸

The latest IRS signal that a solution is coming

In *Rev. Proc. 2008-54*,¹⁹ the Internal Revenue Service announced that the Department of the Treasury intended to amend the regulations²⁰ to permit taxpayers to make an election to claim expense method depreciation²¹ without the consent of the Commissioner for taxable years beginning after 2007 and “. . . beginning before the last year provided in section 179(c)(2) for revoking an election.”²² That seems 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 is effective for taxable years beginning “before 2011.”²³

That language poses two problems – (1) as worded, the authority to make an election without the Commissioner’s consent would necessarily end on December 31, 2009 for calendar year taxpayers, yet the authority to revoke without consent would run through December 31, 2010 for calendar year taxpayers;²⁴ (2) the Department of the Treasury *has not yet acted to amend the regulations.* All we have is their agency (IRS) stating that its parent organization *intended* to make such an amendment. While that appears likely, the problem is not yet totally laid to rest.

FOOTNOTES

¹ Rev. Proc. 2008-54, I.R.B. 2008-38.

² I.R.C. § 179(c).

³ 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] (2008);

Harl, *Agricultural Law Manual* § 4.03[4][j] (2008); Harl, *Farm Income Tax Manual* § 3.20[2][b][iii] (2008 ed.). See also Harl, “New Regulations Permit Late Section 179 Election,” 15 *Agric. L. Dig.* 121 (2004).

⁴ Rev. Proc. 2008-54, § 2.06, I.R.B. 2008-38.

⁵ Rev. Proc. 2008-54, § 2.03, I.R.B. 2008-38.

⁶ *Id.*, § 6.

⁷ Treas. Reg. § 1.179-5(a). See, e.g. McGrath v. Comm’r, T.C. Memo. 2002-231, *aff’d*, 2003-2 U.S. Tax Cas. (CCH) ¶ 50,663 (5th Cir. 2003).

⁸ Treas. Reg. § 1.179-5(c)(i), (2)(i).

⁹ *Id.*

¹⁰ I.R.C. § 179(c)(2).

¹¹ I.R.C. § 179(c)(2) (emphasis added).

¹² Pub. L. No. 109-222, 120 Stat. 345 (2006).

¹³ *Id.*

¹⁴ Pub. L. No. 110-28, 121 Stat. 112 (2007).

¹⁵ I.R.C. § 179(c)(1) (emphasis added).

¹⁶ 2007-1 C.B. 470.

¹⁷ T.D. 9307, 2007-1 C.B. 470.

¹⁸ Treas. Reg. § 1.179-5(c).

¹⁹ I.R.B. 2008-38.

²⁰ Treas. Reg. § 1.179-5(c).

²¹ I.R.C. § 179.

²² Rev. Proc. 2008-54, I.R.B. 2008-38.

²³ I.R.C. § 179(c)(2).

²⁴ I.R.C. § 179(c)(2).