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Can Section 179 Elections Be Made on Amended Returns After 2007?

-by Neil E. Harl

The permanent rule for elections to claim expense method depreciation\(^1\) for many years has been that elections had to be made on the original income tax return (whether or not timely) or on an amended return but only if filed within the time for filing a return (including extensions) for the taxable year.\(^2\) For taxable years beginning after 2002 and before 2008, a taxpayer is permitted to make an expense method depreciation election on an amended federal income tax return without the consent of the Commissioner.\(^3\) The amended return must be filed within the time prescribed for filing an amended return for the taxable year.\(^4\)

Confusion has arisen because the time to revoke an election has been extended to taxable years before 2011 without IRS consent provided the period for filing the amended return has not expired.\(^5\) The question is whether the time for making an election has likewise been extended by implication even though the regulations specifically limit late elections on an amended return to taxable years beginning before 2008.\(^6\)

History of the controversy

The confusion began with the Committee Report\(^7\) to the 2003 Tax Act\(^8\) which indicated that taxpayers could make or revoke an expense method depreciation election on an amended return.\(^9\) The Conference Committee Report, in discussing expensing under Act § 202, stated –

“With respect to a taxable year beginning after 2002 and before 2006, the provision permits taxpayers to make or revoke expensing elections on amended returns without the consent of the Commissioner.”\(^10\)

However, the statutory amendment in the 2003 Act did not support that language as to making an election (but did provide for revocation on an amended return). Nonetheless, the Department of the Treasury issued temporary regulations following the language of the Conference Committee Report for 2002 through 2005.\(^11\) In 2005, Treasury issued regulations confirming the right to elect or revoke without Commissioner consent after 2005 and before 2008.\(^12\) The regulations were amended by T.D. 9209\(^13\) to state that –

“For any taxable year beginning after 2002 and before 2008, a taxpayer is permitted to make an election under section 179 on an amended Federal tax return for that taxable year without the consent of the Commissioner.”\(^14\)

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\(^1\) Charles F. Curtiss Distinguished Professor in Agriculture and Emeritus Professor of Economics, Iowa State University; member of the Iowa Bar.
The statute was further amended in 2006\textsuperscript{15} to extend the period for revocations to be made on an amended return before 2010 \textit{but that legislation did not extend the period for making elections on an amended return.}\textsuperscript{16} 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 \textit{making elections.}\textsuperscript{17} In that regard, the statute \textit{currently} states—

“An election under this section for any taxable year shall – (A) specify the items of section 179 property to which the section applies and the portion of the cost of each of such items which is to be taken into account under subsection (a), and (B) be made on the taxpayer’s return of the tax imposed by this chapter for the taxable year. Such election \textit{shall be made in such manner as the Secretary may by regulations prescribe.}”\textsuperscript{18}

To complicate matters further, the Department of the Treasury issued T.D. 9307\textsuperscript{19} on December 26, 2006, stating—

“For a taxable year beginning after 2002 and before 2010, a taxpayer may make a section 179 election by filing an amended return.”\textsuperscript{20}

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.\textsuperscript{21} Thus, the statement is of doubtful authority.

\textbf{So what is the law?}

The fact that the Department of the Treasury issued T.D. 9209 in 2005 indicates that authority was needed if elections on amended returns were to be assured. The fact that T.D. 9209 only provided that authority through 2007 arguably means that if the authority were to be extended beyond 2007, specific Treasury authorization was needed by regulation. That has not been done. Moreover, the statute clearly states that the election is to be made in such manner as the Secretary \textit{by regulations prescribe.}\textsuperscript{22} The statement in the Explanation of Provisions section of T.D. 9307 falls short of the authority needed.

The statute is clear on \textit{revocations} without the Commissioner’s consent—

“Any election 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 \textit{and before 2011} may be revoked by the taxpayer with respect to any property, and such revocation, once made, shall be revocable.”\textsuperscript{23}

Therefore, it appears that \textit{elections} on amended returns in the pattern of what has been possible in recent years apparently will not be available after 2007 unless Treasury acts within its authority (which is not in question) specifically to extend the authorization for late elections on amended returns. Hopefully, this matter will be clarified in a timely manner.

\textbf{FOOTNOTES}

1. I.R.C. § 179(c).
4. \textit{Id.}
5. I.R.C. § 179(c)(2).
16. \textit{Id.}
18. I.R.C. § 179(c)(1).
22. I.R.C. § 179(c)(1).