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Late Elections and Revocations Under § 179: One More Time

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Late Elections and Revocations Under § 179: One More Time

-by Neil E. Harl*

The long-running saga of late elections and late revocations under expense method depreciation (Section 179) continues, injecting further uncertainty into investment planning which was already burdened for several months by the prospect of the eligible amount dropping to $25,000 after 2012 if no action was taken in Congress.[1] While Congressional action was, indeed, taken, with the American Taxpayer Relief Act[2] extending, through 2013, the expensing allowance of $500,000 with a $2 million phase-out, and extending the period of eligibility (through 2013) for qualified real property for Section 179 depreciation,[3] the new legislation did not address the issue of late elections but did extend, for an additional year, the date by which a Section 179 election could be revoked.[4]

The permanent rule

The permanent rule has been that a Section 179 election could be made on the original return (whether or not timely filed) or on an amended return but only if filed within the time for filing a return (including extensions) for the taxable year.[5] Under the permanent rules, an election can be revoked only with IRS consent, and consents are to be granted "only in extraordinary circumstances."[6] If no election is properly made on the return, an expense method depreciation deduction cannot be claimed.[7]

Elections

For taxable years beginning after 2002 and before 2008, a taxpayer was permitted to make an expense method depreciation election on an amended federal estate tax return without the consent of the Commissioner.[8] The Department of the Treasury has had the authority to provide for late elections for many years.[9] However, that authority has not been exercised for years after 2007.[10]

The Committee Report to the 2003 Tax Act[11] indicated that taxpayers could make an expense method depreciation election on an amended return but the statute did not include that language.[12] Nonetheless, the Department of the Treasury issued temporary regulations following the Conference Committee Report.[13] In 2005, the Department of the Treasury issued regulations confirming the right to elect or revoke without Commissioner consent after 2005 and before 2008.[14] The right to elect on an amended return was not extended through 2012 as was done by the Congress for revocations.[15]

In late August 2008, IRS issued a Revenue Procedure indicating that the Department of the Treasury "intended" to amend the regulations to allow late Section 179 elections without the Commissioner's consent for taxable years after 2007 and before 2010.[16] This,

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in itself, is unusual, for the Internal Revenue Service to be issuing a statement about what their supervising agency, the Department of the Treasury, "intended" to do.[17]

Revocations.

Insofar as revocations are concerned, the Congress retained the power to establish the rules.[18] In a series of enactments, the Congress amended I.R.C. § 179(c)(2) to allow revocations through 2012[19] and now through 2013.[20] However, the Department of the Treasury has not acted in regulations to extend the right to make a late election after 2007.

To sum up

The authority to elect expense method depreciation on a late return has been non-existent in the years since 2007. The authority to revoke an expense method depreciation election has now been extended, by statute, through 2013.

The questions now are whether the Congress will extend the authority to revoke elections on an amended return after 2013 and to make elections on late returns in a parallel fashion, through at least 2013, by Act of Congress. If the Congress does not address late elections further, the question is whether the Department of the Treasury will properly exercise its authority by regulation to allow late elections to be made without the Commissioner's consent.

ENDNOTES

[1] I.R.C. § 179(b)(1(D). See also I.R.C. § 179(b)(2)(D) (phase-out after 2012 of $200,000). See generally 4 Harl, *Agricultural Law* § 29.02[8][h] (2012); Harl, *Agricultural Law Manual* § 4.03[4] (2012), 1 Harl, *Farm Income Tax Manual* § 3.20[2][c][iii) (2012 ed.). For previous articles on this subject, see Harl, "Can Section 179 Elections Be Made on Amended Returns After 2007?" 18 *Agric. L. Dig*. 161 (2007); Harl, "IRS Says Amendments to Regulations Needed for Later Section 179 Elections on Amended returns After 2007," 19 *Agric. L. Dig*. 141 (2008); Harl, "Making Section 179 Elections – One More Time," 21 *Agric. L. Dig*. 161 (2012).

[2] Pub. L. No. 112-240, § 315, 126 Stat. 2313 (2012).

[3] *Id*. § 315(d).

[4] *Id*. § 315(c).

[5] Treas. Reg. § 1,179-5(a). Patton v. Comm'r, 116 T.C. 206 (2001)(self-employed welder could not revoke, amend or modify I.R.C. § 179 election after time expired for filing return for taxable year in question). See McGrath v. Comm'r, T.C. Memo. 202-231, *aff'd*, 2003-2 U.S. Tax Cas. ¶ 50,663 (5th Cir. 2003) (failed to make election on return and too late for amended return; involved cost of improvements to leased retail space).

[6] Treas. Reg. § 1.179-5(b). See King v. Comm'r, T.C. Memo. 1990-548 (taxpayer may not later substitute other property for expense method depreciation property without revoking election).

[7] Starr v. Comm'r, 94 F.3d 1146 (9th Cir. 1996), aff'g, T.C. Memo. 1995-190; Ekman v. Comm'r, T.C. Memo. 1997-318.

[8] Treas. Reg. § 1.179-5(c).

[9] See I.R.C. § 179(c)(1). See Pub. L. No. 97-34, § 202(e), 95 Stat. 172 (1981).

[10] See Treas. Reg. § 1.179-5(c)(2)(i) (can make a late election after 2002 and before 2008).

[11] Jobs and Growth Tax Relief Reconciliation Act of 2003, Pub. L. No. 108-27, § 202(e), 117 Stat. 752 (2003).

[12] H.R. Conf. Rep. No. 108-126, p. 35 (2003).

[13] Temp. Treas. Reg. § 1.179-5T(c)(2)(i).

[14] Treas. Reg. § 1.179-5(c).

[15] See I.R.C. § 179(c)(2).

[16] Rev. Proc. 2008-54, 2008-2 C.B. 722 (the date of 2010 may have been in error inasmuch as the authority to revoke elections without Commissioner consent ran through 2010).

[17] For those who would argue that this is a technicality and that IRS had authority to allow late elections, it should be kept in mind that this is a matter of separation of powers. The Congress gave authority for the Department of the Treasury, to establish the rules for late elections, not IRS.

[18] See I.R.S. § 179(c)(2).

[19] I.R.C. § 179(c)(2), amended by Pub. L. No. 111-312, § 402(e), 124 Stat. 3296 (2010).

[20] Pub. L. No. 112-240, § 315(c), 126 Stat. 2313 (2012).

CASES, REGULATIONS AND STATUTES

by Robert P. Achenbach, Jr

BANKRUPTCY

GENERAL

EXEMPTIONS.

EARNED INCOME CREDIT. The debtor's property included a bank account to which the debtor had deposited an income tax refund, a portion of which was attributable to a federal earned income tax credit. The court held that the federal earned income tax credit was exempt under Ind. Code § 34-55-10-2(c)(11). However, the trustee argued that the credit amount lost its exemption because the funds were commingled in the debtor's bank account with non-exempt funds. The court held that the credit retained its exempt status after commingling in the bank account but the exempt amount would be determined using the first-in, first out method of accounting. Immediately before the deposit of the income tax refund, the balance in the debtors' checking account was $362.23. After the income tax refund was deposited the balance was $5,267.23. However, before the date of filing, withdrawals were made from the account in the total amount of $1,512.13, leaving a balance of $3,755.10 at the time of filing. The court held that, applying the first-in, first-out method, the entire balance at the time of filing consisted of payments received from the earned income credit. Therefore, the debtor was entitled to exempt the entire