

SPECIAL RULES FOR CLAIMING DISASTER LOSSES: REMEDIES FOR TAXPAYERS WHO MISS ELECTION DEADLINES

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Introduction

Thanks to the 24-hour news cycle, many of us have become desensitized to natural disasters and the harm they cause. Nevertheless, the reality is that disasters (such as hurricanes, tornadoes, earthquakes, floods, avalanches, wildfires, etc.) occur regularly, and taxpayers often suffer large financial losses as a result. Congress recognized this issue decades ago and introduced special rules giving taxpayers a chance to claim disaster-related losses in prior years, such that they can access money, in the form of tax refunds, sooner than normal. A recurrent problem is that taxpayers, distraught and distracted after experiencing a disaster, fail to make a timely election to claim the tax benefits. This article explains the relevant rules, special election, and potential remedies for taxpayers who miss the proverbial boat.

Background


It is important, from the outset, to understand the applicable law and its evolution.

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Enactment of tax provision. Generally, the IRS allows a deduction for any loss sustained during a taxable year that is not compensated by insurance or otherwise.¹ Special rules have developed over the years for losses caused by natural disasters. In 1962, Congress enacted the relevant provision, which was originally identified as Section 165(h), and which later became Section 165(i).² It states the following in its current form. Any loss occurring in a “disaster area” and attributable to a “federally declared disaster” may, at the election of the taxpayer, be taken into account for the taxable year immediately before (“Preceding Year”) the taxable year in which the disaster actually occurred (“Disaster Year”).³

Reasons for preferential treatment. Section 165(i), like most tax provisions, was passed because certain lawmakers had a personal stake in the matter; they were seeking favorable tax treatment for their constituents. The records from more than a half-century ago contain statements by a handful of politicians justifying the ability of taxpayers affected by disasters to claim a tax loss the year before the disasters took place. For instance, the Senator who introduced the pertinent bill announced the following:

Under this amendment when a major disaster strikes an area between the date of January 1 and



Taxpayers, after experiencing a disaster, may easily fail to make a timely election to claim the tax benefits arising out of the disaster. This article explains the relevant rules, special election, and potential remedies for taxpayers who miss applicable deadlines.

the final date prescribed by law for the filing of income-tax returns and when such area is subsequently declared by the President of the United States by Executive Order to be a disaster area, the taxpayer suffering the losses of property as the result thereof can elect to deduct such losses for the taxable year immediately preceding such disaster . . . The purpose of this amendment is to allow these citizens who suffer such casualty losses as the result of a disaster which occurs in the described period to compute their losses as though the loss has occurred in the preceding year. This will be beneficial in two categories. First and most important, it will give to the taxpayers suffering these losses the refunds and the use of their money 1 year earlier, or at a time when they need it most; and second and perhaps of equal importance, it will prevent many good citizens who have always paid their taxes on time but who now, through no fault of their own, are in distressed circumstances, from being classed as tax delinquents on the Treasury Department's records.⁴

A recurrent problem is that taxpayers, distraught and distracted after experiencing a disaster, fail to make a timely election to claim the tax benefits.

Other politicians supporting the introduction of a disaster-loss-timing election presented a more emotional argument:

I had occasion the other day to go to the Atlantic coast of New Jersey to take a look for myself at the damage that was done there. I was taken on an inspection tour by local officials. The only way we could get through was by a caterpillar-equipped vehicle. I must say that the damage done not only to public facilities but also to private homes and private businesses is just completely unbelievable unless you see it for yourself. It does seem to me that this measure is only equitable and fair. It will not ultimately result in any loss of revenue to the Government but will be of immense help to people in the disaster area who have suffered very seriously from the terrific storm that struck them.⁵

At least two other politicians publicly spoke in favor of the taxpayer relief found in Section 165(h), raising similar points about the severity of storms, extent of destruction, and need to

get tax refunds in the hands of those affected as soon as possible.⁶

Evolution of rules for making election. The manner for a taxpayer to make a disaster-loss-timing election is *not* contained in Section 165 or elsewhere in the Internal Revenue Code. Rather, this information is provided in regulations and related IRS guidance. The rules, as shown below, have changed over time.

Regulations from 1964. The IRS issued its first set of regulations to implement Section 165(h) in 1964.⁷ The relevant portion contained the following information about how taxpayers can make a disaster-loss-timing election to claim the loss in the Preceding Year.

An election to claim a disaster loss deduction for the [Preceding Year] must be made by filing a return, an amended return, or a claim for refund clearly showing that the election provided by Section 165(h) has been made . . .

An election in respect of a loss arising from a particular disaster must be made on or before the later of (1) the fifteenth day of the third month following the month in which falls the date prescribed for the filing of the income tax return (determined without regard to any extension of time granted the taxpayer for filing such return) for the [Preceding Year], or, (2) the due date for filing the income tax return (determined with regard to any extension of time granted the taxpayer for filing such return) for the [Preceding Year].⁸

Let's put that into plain English. Assuming that the disaster occurred in 1966, and further assuming that the rules in place at the time allowed taxpayers to obtain an automatic six-month extension for filing Forms 1040 (U.S. Individual Income Tax Returns), the taxpayer had to file the disaster-loss-timing election by (1) 7/15/1966, or (2) 10/15/1966, if the taxpayer had requested an extension for filing the 1965 Form 1040.

¹ Section 165(a).

² P.L. 87-426 (3/31/1962); House Resolution 641, "An act to provide for the free entry of an intermediate lens beta-ray spectrometer for the use of Tulane University, New Orleans, La., and to amend section 165 of the Internal Revenue Code of 1954 with respect to treatment of casualty losses in areas designated by the President as disaster areas;" Senate Joint Resolution 173 (3/16/2019).

³ Section 165(i)(1); Reg. 1.165-11(a). For these purposes, the term "disaster area" means the area determined by the U.S. President to warrant assistance under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, while the term "federally declared disaster" means any disaster triggering such assistance. See Section 165(i)(5); Reg. 1.165-11(b)(1) and (2).

⁴ Congressional Record, Proceedings and Debate of the 87th Congress, 3/19/1962, pg. 4110, statement by Senator Williams.

⁵ Congressional Record, Proceedings and Debate of the 87th Congress, 3/21/1962, pg. 4301-2, statement by Senator Harreck.

⁶ See, e.g., Congressional Record, Proceedings and Debate of the 87th Congress, 3/21/1962, pg. 4301-2, statement by Senator McDowell; Congressional Record, Proceedings and Debate of the 87th Congress, 3/21/1962, pg. 4301-2, statement by Senator Harding.

⁷ TD 6735; Reg. 1.165-11.

⁸ TD 6735; Reg. 1.165-11(e).

Regulations from 1972. Nearly a decade later, in 1972, the IRS modified the rules regarding the manner for making a disaster-loss-timing election.⁹ The relevant regulation was amended to state as follows:

An election in respect of a loss arising from a particular disaster occurring after December 31, 1971, must be made on or before the later of (1) the due date for filing the income tax return (determined without regard to any extension of time granted the taxpayer for filing such return) for the [Disaster Year], or (2) the due date for filing the income tax return (determined with regard to any extension of time granted the taxpayer for filing such return) for the [Preceding Year]

Assuming that the disaster happened in 1975 and that the reigning rules permitted taxpayers to get an automatic six-month extension for filing Forms 1040, the deadline for filing a disaster-loss-timing election would have been the later of (1) 4/15/1976, or (2) 10/15/1975, if the taxpayer had requested an extension for filing the 1974 Form 1040.

Series of Notices extending deadlines. Section 7508A empowers the IRS to postpone the time for performing certain acts, including the filing of returns, for up to one year for taxpayers affected by a federally declared disaster.¹⁰ Pursuant to that authority, the IRS issued a series of Notices over the years granting extensions to file disaster-loss-timing elections, among them Notice 2013-21, 2013-15 IRB 903 (related to Hurricane Sandy), Notice 2014-20, 2014-16 IRB 937 (related to Colorado storms), and Notice 2006-17, 2006-1 CB 559 (related to Hurricanes Katrina, Rita, and Wilma). The IRS issued such Notices because taxpayers were failing to file timely disaster-loss-timing elections, notwithstanding the expanded period established in the regulations from 1972.

Regulations from 2016. Looking back to the Notices that it had issued over the years, the IRS acknowledged that “concerns have been raised that the due date for making the Section 165(i) election may not always provide sufficient time for taxpayers affected by disasters to consider whether to make the election.”¹¹ To address such concerns, the IRS

issued temporary regulations in 2016, along with Revenue Procedure 2016-53, 2016-44 IRB 530.

The temporary regulations stated the following: (1) An individual taxpayer makes a disaster-loss-timing election to deduct a loss for the Preceding Year on Form 1040 for the Preceding Year, or on a Form 1040X for the Preceding Year in the manner specified by the IRS in published guidance;¹² (2) The due date for making the election is six months after the original/unextended due date for filing Form 1040 for the Disaster Year;¹³ (3) The manner for making or revoking a disaster-loss-timing election can be modified by the IRS through published guidance;¹⁴ (4) The temporary regulations apply to disaster-loss-timing elections made on or after 10/13/2016;¹⁵ and (5) The temporary regulations expire on 10/13/2019.¹⁶

The Preamble to the temporary regulations cross-references Revenue Procedure 2016-53, as follows: “Contemporaneously with these temporary regulations, the Treasury Department and IRS are issuing Rev. Proc. 2016-53, 2016-44 IRB 530, which specifies how a taxpayer makes a Section 165(i) election and incorporates the due date for making the election provided in these temporary regulations.”¹⁷

The manner for a taxpayer to make a disaster-loss-timing election is *not* contained in Section 165 or elsewhere in the Internal Revenue Code; rather, this information is provided in regulations and related IRS guidance.

Revenue Procedure 2016-53 provides the following instructions: (1) An individual taxpayer makes a disaster-loss-timing election by deducting the loss on either Form 1040 or Form 1040X for the Preceding Year, including a proper Election Statement;¹⁸ (2) The Election Statement must contain the name or description of the disaster, the date or dates of such disaster, and the address where the damaged or destroyed property was located;¹⁹ (3) If an individual taxpayer makes a disaster-loss-timing election on Form 1040, the taxpayer must provide the information from the Election State-

⁹ TD 7224; Reg. 1.165-11(e).

¹⁰ Section 7508A(a)(1); See also Section 7508(a)(1).

¹¹ TD 9789, Preamble.

¹² Reg. 1.165-11T(e).

¹³ Reg. 1.165-11T(f).

¹⁴ Reg. 1.165-11T(h).

¹⁵ Reg. 1.165-11T(i).

¹⁶ Reg. 1.165-11T(j).

¹⁷ TD 9789, Preamble.

¹⁸ Rev. Proc. 2016-53, section 3.01.

¹⁹ Rev. Proc. 2016-53, section 3.02.

²⁰ Rev. Proc. 2016-53, section 3.03.

ment on Lines 1 or 19, as applicable, of Form 4684 (Casualties and Thefts), attaching a document if space is insufficient;²⁰ and (4) If an individual taxpayer makes a disaster-loss-timing election on Form 1040X, the taxpayer may provide the Election Statement data by “any reasonable means,” which include, but are not limited to, writing the name or a description of the disaster, the state in which the damaged or destroyed property was located, and “Section 165(i) Election” on the top of Form 4684, and providing the rest of the information in the Explanation of Changes box in Form 1040X, or directly on Form 4684, attaching a document if space is insufficient.²¹

In terms of deadlines, Revenue Procedure 2016-53 creates more flexibility for taxpayers, beyond that offered in the earlier regulations from 1964 and 1972. It states the following:

- An individual taxpayer must make the disaster-loss-timing election on Form 1040 or Form 1040X for the Preceding Year;
- Form 1040 or Form 1040X must be filed by the date that is six months after the original/unextended deadline for filing Form 1040 for the Disaster Year; and
- The taxpayer is not required to file a request for an automatic six-month filing extension for Form 1040 for the Disaster Year in order to benefit from the special deadline for filing Form 1040 or Form 1040X for the Preceding Year.²²

The IRS issued a series of Notices over the years granting extensions to file disaster-loss-timing elections

An illustration would help. Assuming that the disaster transpired in 2017, the deadline under Revenue Procedure 2016-53 would be 10/15/2018.

Regulations from 2019. The final regulations, which replaced the temporary regulations described above, apply to disaster-loss-timing elections made after 10/16/2019.²³ They contain the same deadline as that set forth in Revenue Procedure 2016-53.²⁴

Extensions to file disaster-loss-timing elections

As demonstrated by the long list of Private Letter Rulings (“PLRs”) described below, taxpayers and their advisors frequently miss the deadline for filing the disaster-loss-timing election, despite the fact that the IRS liberalized the rules in 1964, 1974, and 2016. The good news is that Congress is contemplating various ways to help taxpayers negatively impacted by natural disasters.²⁵ If the legislative route does not work out, taxpayers still have the possibility of claiming a loss in the Preceding Year, if (1) the IRS issues one of its Notices granting a blanket extension with respect to a particular disaster, or (2) the taxpayers know about, and successfully navigate, the procedures to obtain a PLR. A summary of the applicable PLR standards is set forth below.

In general. In formulating the standards for granting an extension via a PLR under Reg. 301.9100-1 *et seq.*, the IRS identified two policies that must be balanced. The first policy is promoting efficient tax administration by providing limited time periods for taxpayers to choose among alternative tax treatments. The second policy is “permitting taxpayers that are in reasonable compliance with the tax laws to minimize their tax liability by collecting from them only the amount of tax they would have paid if they had been fully informed and well advised.”²⁶

There are three main types of elections, one of which is a “regulatory election.” It is defined as an election whose due date is set by a regulation published in the Federal Register or a revenue ruling, revenue procedure, notice, or announcement published in the Internal Revenue Bulletin.²⁷ If the filing deadline for a “regulatory election” has passed, taxpayers generally may request a discretionary extension of time to file an election under Reg. 301.9100-3.²⁸

Factors for obtaining relief. The IRS has discretion to grant reasonable extensions.²⁹ The regulations indicate that extension requests, issued in the form of PLRs, “will be granted” when the taxpayer provides the evidence (including the requisite affi-

²¹ Rev. Proc. 2016-53, section 3.03.

²² Rev. Proc. 2016-53, sections 5.01 and 5.02.

²³ Reg. 1.165-11(h).

²⁴ Reg. 1.165-11(e) and (f).

²⁵ In 2019 alone, multiple bills of this nature have been introduced, in both the House of Representatives and Senate. *See, e.g.,* Hurricane Florence Tax Relief Act (H.R. 536), Disaster Tax Relief Act (H.R. 11480), Taxpayer Certainty and Disaster Tax Re-

lief Act (H.R. 3301), Tax Relief and Expedited Assistance for Disasters Act (H.R. 3287), and Tax Extender and Disaster Relief Act (S. 617).

²⁶ TD 8742, 62 Fed. Reg. 68168.

²⁷ Reg. 301.9100-1(b).

²⁸ *See, e.g.,* Field Service Advisory 200202022 (9/24/2001).

²⁹ Reg. 301.9100-1(c).

davits) to establish to the satisfaction of the IRS that the following two factors have been met: (1) the taxpayer acted reasonably and in good faith, and (2) granting the extension will not prejudice the interests of the U.S. Government.³⁰ These two factors are examined below.

First factor—reasonableness and good faith. With respect to the first factor, a taxpayer is generally deemed to have acted reasonably and in good faith *if any one of the following* is true:

- The taxpayer requests relief before the IRS discovered the failure to make the regulatory election; *or*
- The taxpayer failed to make the election because of intervening events beyond the taxpayer's control; *or*
- The taxpayer failed to make the election because, after exercising reasonable diligence (taking into account the taxpayer's experience and the complexity of the return or issue), the taxpayer was unaware of the necessity for the election; *or*
- The taxpayer reasonably relied on the written advice of the IRS; *or*
- The taxpayer reasonably relied on a qualified tax professional, including a tax professional employed by the taxpayer, and the tax professional failed to make, or advise the taxpayer to make, the election.³¹

Notwithstanding the general rules described above, a taxpayer will be deemed *not* to have acted reasonably and in good faith if any of the following is true:

- The taxpayer seeks to alter a return position for which an accuracy-related penalty has been or could be imposed at the time the taxpayer requests relief (taking into account any qualified amended return filed), and the new position requires or permits a regulatory election for which relief is requested; *or*
- The taxpayer was informed in all material respects of the required election and related tax consequences, but chose not to file the election; *or*
- The taxpayer uses hindsight in requesting relief. In other words, if specific facts have changed, since the due date for making the election, that make the election advantageous to a taxpayer, the IRS will not ordinarily grant relief. In such cases, the IRS will grant an extension request only when the taxpayer provides "strong proof" that the taxpayer's decision to seek relief did not involve hindsight.³²

Second factor—no damage to government. With respect to the second element, there are two standards that the IRS uses in determining whether the interests of the U.S. Government would be prejudiced by the granting of an extension request. First, the interests of the U.S. Government are prejudiced if granting the extension request would result in a taxpayer (or taxpayers) having a lower tax liability in the aggregate, for all taxable years affected by the election, than the taxpayer (or taxpayers) would have had if the election had been timely made, taking into account the time value of money.³³ Second, the interests of the U.S. Government are ordinarily prejudiced if the taxable year in which the regulatory election should have been made, or any taxable years that would have been affected by the election had it been timely made, are closed by the period of limitations on assessment under Section 6501(a) before the taxpayer receives a PLR granting the extension.³⁴

Favorable PLRs in similar circumstances

The IRS has issued a number of PLRs over the years granting extensions to taxpayers to make late disaster-loss-timing elections under Section 165(i) or its predecessor. Relevant excerpts from such PLRs are set forth below.

Ltr. Rul. 9218022. *Relevant facts.* "B, a C corporation, is an agricultural producer. Its operation is fully integrated involving production, processing, manufacturing, and distribution. Certain facilities are located in K, L, and M counties in State. In December 1990 the three counties underwent a type of disaster. The due date for B to elect to deduct disaster losses was 3/15/1991. Rev. Rul. 91-10, 1991-1 CB 48, published 2/19/1991, listed certain 1990 disaster areas but did not include K, L, or M counties. B consulted D, its first certified public accountant, early in 1991 regarding the requirements for the election to deduct disaster losses. Also, B contacted the local IRS district, the Small Business Administration, and the K County Agricultural Commissioner to ascertain if the three counties had been declared disaster

³⁰ Reg. 301.9100-3(a).

³¹ Reg. 301.9100-3(b)(2). A taxpayer will not be considered to have reasonably relied on a qualified tax professional if the taxpayer knew or should have known that the tax professional was either (1) not competent to render advice on the election, or (2) unaware of all the relevant facts. See Reg. 301.9100-3(b)(2).

³² Reg. 301.9100-3(b)(3).

³³ Reg. 301.9100-3(c)(1)(i).

³⁴ Reg. 301.9100-3(c)(1)(ii).

areas. On 4/29/1991, the three counties were designated disaster areas by Announcement 91-66, 1991-17 IRB 29. B became aware of the designations in May 1991 and since the deadline for making the election to deduct disaster losses had passed, J, B's second certified public accountant, sought guidance from the IRS National Office. After some delay J was instructed to seek relief under Reg. 301.9100-1(a)."

Ruling. "Based on the information submitted and the representations made by B, it is held that 'good cause' has been demonstrated for the granting of relief under Reg. 301.9100-1(a). Accordingly, B is granted an extension of time of 45 days from the date of this letter to file an election under Section 165(i) in connection with its claim for a loss deduction arising from the disasters in December 1990."

Ltr. Rul. 9534016. *Relevant facts.* "It is represented that Individual A invests in real property and suffered losses of approximately \$ to Property P in State Z. These losses were incurred in September 1992, due to Disaster D. It is represented that Property P was always held as an investment. For many years, including 1992, Individual G, a CPA, prepared Individual A's federal income tax returns. However, Individual G states that he was unaware of the availability of a Section 165(i) election to deduct a disaster

who failed to inform him of the election due date because the CPA did not know the election was available, according to his statement. The taxpayer was never given a chance to make an informed decision to deduct the loss for 1991. A later evaluation by Individual H advised the taxpayer that deduction in 1991 would have been possible."

Ltr. Rul. 9603023. *Relevant facts.* "In 1993, Taxpayers incurred a loss attributable to a flood. The President of the United States subsequently determined that the damage caused by the disaster warranted assistance under the Disaster Relief and Emergency Assistance Act. Taxpayers requested and received an extension of time, from 4/15/1994, to and including 10/15/1994, within which to file their 1994 federal income tax return. On 9/9/1994, Taxpayers filed their 1994 return reporting a Section 165(i) election to take a deduction for the disaster loss for the taxable year immediately preceding the taxable year in which the disaster occurred. By letter dated 10/28/1994, the IRS determined that the Section 165(i) election was untimely made."

Ruling. "Taxpayers have submitted an affidavit that states they were advised about the Section 165(i) election by a qualified tax professional, but that the tax professional failed to inform them that the Section 165(i) election had to be made by 4/15/1994. The tax professional has submitted an affidavit that states he was unaware that the election for a 1993 casualty loss had to be made by 4/15/1994. Both the Taxpayers and the tax professional have also declared that they did not make the Section 165(i) election until 9/9/1994, because they did not know the magnitude of the loss until that date. Based on the information submitted and the representations made by the Taxpayers, it is held that relief is appropriate under Rev. Proc. 92-85, 1992-1 CB 490, and Reg. 301.9100-1. Accordingly, the Taxpayers are granted an extension of time of 45 days from the date of this letter to file an election under Section 165(i) in connection with their claim for a loss deduction arising from the flood in 1993."

Ltr. Rul. 9603024. *Relevant facts.* "During 1994, Taxpayers incurred a loss attributable to an earthquake. The President of the United States subsequently determined that the damage caused by the disaster warranted assistance under the Disaster Relief and Emergency Assistance Act. In the latter part of 1994, Taxpayers consulted with

Final regulations, which replaced temporary regulations, apply to disaster-loss-timing elections made after 10/16/2019.

loss in a prior year, and in particular, its deadline. Individual G had never filed such an election to claim the loss in a prior year, and did not think of doing so by 4/15/1993, the time prescribed in Reg. 1.165-11(e). Subsequently, Individual A's legal counsel, Individual H, of Firm F, told Individual A of the deadline of the Section 165(i) election. Until that time, Individual A was unaware that he could have used the 1992 loss in 1991 to obtain a refund of 1988 taxes that would be otherwise barred. The 1988 refund would have been available to pay most of his 1992 tax liability, and Individual A also knew that in the first quarter of 1993 he had a loss of considerable size in Property Q (a foreclosure or deed in lieu of foreclosure) that would have offset some or all of his 1992 tax liability."

Ruling. "Based on the facts presented and the representations made, we conclude that the taxpayer has shown good cause for its failure to make a timely election under Section 165(i). Individual A relied on Individual G, his CPA,

a tax professional and decided to claim the loss for the 1993 taxable year by amending their 1993 tax return. Taxpayers filed their 1994 tax return without deducting any casualty loss due to the earthquake.”

Ruling. “Taxpayers have submitted an affidavit that states they were advised about the Section 165(i) election by a qualified tax professional, but that the tax professional incorrectly advised them as to when the Section 165(i) election needed to be made. The tax professional has submitted an affidavit that states she mistakenly interpreted Reg. 1.165-11 and thus did not realize that the election had to be made by 4/15/1994. Upon discovering the error, the tax professional submitted a request for relief. The Taxpayers’ situation in the instant case meets the requirements of Reg. 301.9100 and Rev. Proc. 92-85. The time for making the Section 165(i) election is not expressly prescribed by the statute. The Taxpayers reasonably and in good faith relied upon a qualified tax professional, who failed to advise the Taxpayers to make the election in a timely manner. The interests of the government will not be prejudiced, as granting relief will not result in Taxpayers having a lower tax liability in the aggregate than if the election had been timely made. Based on the informa-

tion submitted, it is held that relief is appropriate under Rev. Proc. 92-85, 1992-1 CB 490, and Reg. 301.9100-1. Accordingly, the Taxpayers are granted an extension of time of 45 days from the date of this letter to file an election under Section 165(i) in connection with their claim for a loss deduction arising from the earthquake in 1994.”

Ltr. Rul. 9622020. *Relevant facts.* “The information submitted indicates that Taxpayer’s business properties were damaged in a 1994 earthquake that was declared a disaster by President Clinton. Taxpayer and her tax advisor agreed to elect to deduct the 1994 disaster losses in 1993 pursuant to the provision of Section 165(i)(1). In an attempt to determine the due date for making this election, Taxpayer’s tax advisor was misinformed by an IRS employee. Upon discovering

the due date, Taxpayer’s advisor submitted this request.”

Ruling. “In this case, Taxpayer’s actions are consistent with an intent to timely file the election to claim disaster losses in the preceding year. In addition, it is our opinion that Taxpayer’s actions were reasonable for an individual attempting to file this election. Finally, it is our opinion that the granting of an extension will not jeopardize the interests of the Government. Based on the information submitted and the representations made, it is held that good cause has been demonstrated for the granting of relief under Reg. 301.9100-1(a). Therefore, an extension of time to file the Section 165(i)(1) election has been granted for the tax year requested.”

Ltr. Rul. 9732012. *Relevant facts.* “In 1995, the taxpayer’s home and surrounding property suffered extensive damage due to flooding. The President of the United States determined that the area warranted Federal assistance under the Disaster Relief and Emergency Assistance Act. The taxpayers consulted their accounting firm soon after the disaster occurred to inquire about the tax consequences of the event and determined that it was in their best interests to elect under Section 165(i) to take the loss into account for the taxable year

The regulations indicate that extension requests, issued in the form of PLRs, will be granted when the taxpayer provides the evidence (including the requisite affidavits) to establish to the satisfaction of the IRS that the following two factors have been met: (1) the taxpayer acted reasonably and in good faith, and (2) granting the extension will not prejudice the interests of the U.S. Government.

immediately preceding the taxable year in which the disaster occurred. However, the taxpayer’s representatives failed to discover that, under Reg. 1.165-11(e), the deadline for making the election was 4/15/1996, the due date of the taxpayer’s return for the 1995 tax year. Consequently, the taxpayer’s election was not timely filed.”

Ruling. “Based on the circumstances of this situation, the information submitted, affidavits submitted by the taxpayer, and the representations made, it is held that ‘good cause’ has been demonstrated for the granting of relief under Reg. 301.9100-3T. Additionally, the interests of the government are not prejudiced by the granting of relief. Accordingly, the taxpayers are granted an extension of time of 45 days of this letter to file an election under Section 165(i) in connection with their claim of loss deduction arising from the flood in 1995.”

Ltr. Rul. 9752056. *Relevant facts.* “The information submitted indicates that in December of 1996, the taxpayer’s home and surrounding property suffered extensive damage due to landslides and flooding resulting from heavy snowfall. The President of the United States determined that the area warranted Federal assistance under the Disaster Relief and Emergency Assistance Act. The information further shows that the taxpayers intended to make the election available under Section 165(i) on a timely basis, and engaged a qualified tax professional in order to assure the making of a proper election. However, due to an error or misunderstanding on the part of the tax professional, the election was not made in a proper manner. The error was not due to any lack of due diligence or prompt action on the part of the taxpayers.”

Ruling. “The information submitted and representations furnished by the taxpayer and its tax professionals establish that the taxpayer acted reasonably and in good faith in respect of this matter. Furthermore, the granting of relief in this case will not prejudice the interests of the government within the meaning of Reg. 301.9100-3T(c)(1). Accordingly, the requirements of Reg. 301.9100-3T for the granting of relief in this instance have been satisfied.

Ruling. “The information submitted and the representations furnished by the taxpayer and its tax professionals establish that the taxpayer acted reasonably and in good faith in this matter. Furthermore, the granting of relief in this case will not prejudice the interests of the government within the meaning of Reg. 301.9100-3(c)(1). Accordingly, the requirements of Reg. 301.9100-3 for the granting of relief have been satisfied and the taxpayer is granted an extension of time to make the election available under Reg. 1.165-11 for the 10/4/1998 disaster loss.”

Ltr. Rul. 200548005. *Relevant facts.* “On Date 1, Year 2, Taxpayers incurred a loss attributable to an earthquake. The President of the United States subsequently determined that the damage caused by the disaster warranted assistance under the Disaster Relief and Emergency Assistance Act. Taxpayers consulted their accounting firm soon after the disaster occurred to inquire about the tax consequences of the event and to inquire about the Section 165(i) election. Due to the disaster occurring at the end of Year 2 and the difficulty of establishing the amount of the loss, the Taxpayers filed an extension for their Year 2 return from April 15, Year 3, to and including October 15, Year 3, believing that this would allow them time to make the Section 165(i) election. However, the Taxpayer’s representative failed to discover that, under Reg. 1.165-11(e), the deadline for making the election was April 15, Year 3, the due date of the Taxpayer’s return for the Year 2 tax year, without extensions. Consequently, the Taxpayer’s election was not timely filed. Upon discovering the due date, the Taxpayers submitted this request promptly.”

Ruling. “The Taxpayers have submitted an affidavit that states that they were advised about the Section 165(i) election by a qualified tax professional, but that the tax professional failed to inform them until Date 2, Year 4 that the Section 165(i) election had to be made by April 15, Year 3. The tax professional has submitted an affidavit that states that he was unaware that the election for the Year 2 casualty loss had to be made by April 15, Year 3. Furthermore, the Taxpayers have also declared that due to the turmoil in the affected area the magnitude of the loss was not known until early Year 4. Upon discovering the error in failing to make the Section 165(i) election, the Taxpayers promptly submitted a request for relief. The information submitted and the

The IRS has issued a number of PLRs over the years granting extensions to taxpayers to make late disaster-loss-timing elections under Section 165(i) or its predecessor.

Therefore, the taxpayer is hereby granted an extension of time to make the election available under Reg. 1.165-11 with respect to the December 1996 disaster loss.”

Ltr. Rul. 200006037. *Relevant facts.* “The information submitted indicates that on or about 10/4/1998, your home and surrounding property suffered extensive damage due to flooding. The President of the United States determined that the area warranted Federal assistance under the Disaster Relief and Emergency Assistance Act. The information further shows that you intended to make the election available under Section 165(i) on a timely basis, and engaged a qualified tax professional in order to assure the making of a proper election. However, due to an error or misunderstanding on the part of the tax professional, the election was not made in a proper manner. The error was not due to any lack of due diligence or prompt action on your part.”

representations and affidavits furnished by the Taxpayers and their tax professional establish that the Taxpayers acted reasonably and in good faith in this matter. Furthermore, the granting of relief in this case will not prejudice the interests of the government within the meaning of Reg. 301.9100-3(c)(1). Accordingly, the requirements of Reg. 301.9100-3 for the granting of relief have been satisfied and the Taxpayers are granted an extension of time to make the election available under Section 165(i) and Reg. 1.165-11 for the December Year 2 disaster loss.”

Ltr. Rul. 200619016. *Relevant facts.* “The information submitted indicates that in August of 2004, your vacation home in . . . suffered extensive damage due to Hurricane Charley. The President of the United States determined that the area of your vacation home warranted federal assistance under the Disaster Relief and Emergency Assistance Act. The information further shows that you intended to make the election available under Section 165(i) on a timely basis and engaged a qualified tax professional in order to assure the making of a proper election. However, due to an error or misunderstanding on the part of the tax professional, the election was not made. The error was not due to any lack of diligence or prompt action on your part.”

Ruling. “The information and affidavits submitted and the representations furnished by you and your tax professional establish that you acted reasonably and in good faith in this matter. Furthermore, the granting of relief in this case will not prejudice the interests of the government within the meaning of Reg. 301.9100-3(c)(1). Accordingly, the requirements of Reg. 301.9100-3 for the granting of relief have been satisfied, and you are granted an extension of time to make the election available under Reg. 1.165-11 for the August 2004 disaster loss.”

Ltr. Rul. 200625002. *Relevant facts.* “The information submitted indicates that in August of 2004, your condominium in . . . sustained extensive damage due to Hurricane Charley. The President of the United States determined that the area of your condominium warranted federal assistance under the Disaster Relief and Emergency Assistance Act. The information further shows that you intended to make the election available under Section 165(i) on a timely basis and engaged a qualified tax professional in order to assure the making of

a proper election. However, due to an error or misunderstanding on the part of the tax professional, the election was not made. The error was not due to any lack of diligence or prompt action on your part.”

Ruling. “The information and affidavits submitted and the representations furnished by you and your tax professional establish that you acted reasonably and in good faith in this matter. Furthermore, the granting of relief in this case will not prejudice the interests of the government within the meaning of Reg. 301.9100-3(c)(1). Accordingly, the requirements of Reg. 301.9100-3 for the granting of relief have been satisfied, and you are granted an extension of time to make the election available under Reg. 1.165-11 for the August 2004 disaster loss.”

Ltr. Rul. 200907019. *Relevant facts.* “The information submitted indicates that in October 2007, your home and surrounding property suffered damage due to wildfires. The President of the United States determined that the area warranted Federal assistance under the Disaster Relief and Emergency Assistance Act. The information further shows that you intended to make the election available under Section 165(i) on a timely basis, and engaged a qualified tax professional in order to assure the making of a proper election. However, due to an error or misunderstanding on the part of the tax professional, the election was not made in a proper manner. The error was not due to any lack of due diligence or prompt action on your part.”

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Ruling. “The information submitted and the representations furnished by the taxpayer and its tax professionals establish that the taxpayer acted reasonably and in good faith in this matter. Furthermore, the granting of relief in this case will not prejudice the interests of the government within the meaning of Reg. 301.9100-3(c)(1). Accordingly, the requirements of Reg. 301.9100-3 for the granting of relief have been satisfied and the taxpayer is granted an extension of time to make the election available under Reg. 1.165-11 for the October 2007 disaster loss. Furthermore, the granting of relief in this case will not prejudice the interests of the government within the meaning of Reg. 301.9100-3(c)(1). Accordingly, the requirements of Reg. 301.9100-3 for the granting of relief have been satisfied and the taxpayer is granted an extension of time to make the election available under Reg. 1.165-11 for the October 2007 disaster loss.”

Ltr. Rul. 201129022. *Relevant facts.* “Taxpayer, a husband and wife, operate rental properties that were damaged in Year 2 as a result of Disaster. The President of the United States determined that the damage caused by Disaster warranted assistance by the Federal Government under the Robert T. Stafford Disaster Relief and Emergency Assistance Act. On Date 2, Taxpayer contacted Accountant to prepare an income tax return for Year 2. At the time, Taxpayer did not have complete information, such as loss verification reports from the Small Business Administration Disaster Processing Unit, to file the income tax return for Year 2 and filed an extension for the Year 2 income tax return. Accountant overlooked the deadline (Date 3) to report Taxpayer’s loss from Disaster on a Year 1 amended tax return. Accountant mistakenly believed that an exception to the deadline to elect to report a casualty loss attributable to a federally declared disaster in the immediately preceding year applied for losses resulting from Disaster, and applied the exception to Taxpayer’s loss from Disaster. As a result, Taxpayer’s amended income tax return for Year 1 and original income tax return for Year 2 were filed on Date 4. Taxpayer claimed the Year 2 casualty loss on the Year 1 amended tax return to ease some of the financial obligations associated with restoring the damaged properties. Taxpayer received a notice from the IRS disallowing the claim for refund for the Year 1 amended tax return because it was received after the Date 3 deadline for making an election to claim a Year 2 casualty loss for Disaster on a Year 1 income tax

return. The taxpayer then asked the Appeals Office of the IRS for reconsideration of the claim disallowance and the Appeals Office denied the claim.”

Ruling. “Taxpayer provided information and representations to establish that Taxpayer satisfies the requirements of Reg. 301.9100-3. The information and representations made by Taxpayer and Accountant establish that Taxpayer acted reasonably and in good faith . . . Furthermore, granting an extension will not prejudice the interests of the Government. Also, the taxable year in which the regulatory election should have been made is not closed by the period of limitations on assessment.”

Ltr. Rul. 201542002. *Relevant facts.* “In October 2012, Taxpayers’ home and surrounding property were damaged by Hurricane Sandy. In October 2012, the President of the United States determined that the area in which Taxpayers’ property is located warranted assistance by the Federal Government under the Robert T. Stafford Disaster Relief and Emergency Assistance Act. Taxpayers consulted with their tax advisor to prepare their tax return for the Year 2 taxable year. On B, Taxpayers filed their federal income tax return for Year 2 after several discussions with their tax advisor, C. Taxpayers’ tax advisor stated in his affidavit that he was not aware of the Section 165(i) election to deduct a disaster loss in the immediately preceding year and therefore did not advise them they could file an election to claim the loss in the Year 1 taxable year. In D, Taxpayers selected a different tax advisor to prepare and file their federal income tax return for Year 3. At that time, Taxpayers claimed they had more information available about the amount of the loss attributable to the Year 2 disaster, and this was also discussed with the tax advisor. In E, this tax advisor also advised Taxpayers about the election to claim a disaster loss in the taxable year immediately preceding the year of the disaster under Section 165(i). Prior to their discussions with this tax advisor, Taxpayers were not aware of the Section 165(i) election or the necessity to make the election by 10/15/2013. Consequently it was determined to request relief to late file the election, as the filing of a late election is within the discretion of the Commissioner under Regs. 301.9100-1 and 301.9100-3.”

Ruling. “The information submitted and representations made by Taxpayers and their tax professionals establish that Taxpayers acted reasonably and in good faith in respect of this matter. Furthermore, based on the facts of the case provided, granting an extension will not

prejudice the interests of the Government within the meaning of Reg. 301.9100-3(c)(1).”

Conclusion

As people continue to damage the environment, natural disasters will occur with greater frequency and intensity, taxpayers will want to make disaster-loss-timing elections to claim the tax benefits in the Preceding Year, and many will miss the deadline out of ignorance and/or misplaced re-

liance on their tax professionals. The silver lining, though difficult to find in the context of natural disasters, is that the IRS has further relaxed the filing dates for all elections made after 10/16/2019, taxpayers can still seek a PLR to rectify matters if they fail to meet the new, more flexible standards, and, as demonstrated above, the IRS has a history of broadly interpreting the concepts of reasonable cause and good faith in determining whether taxpayers merit administrative relief to make late elections. ■