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SUBJECT Filing Due Date for Elections
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Please note that the following document, although believed to be correct at the time of issue, may not represent the current position of the CRA. Prenez note que ce document, bien qu'exact au moment émis, peut ne pas représenter la position actuelle de l'ARC.

PRINCIPAL ISSUES: Whether an election will be considered late-filed where the election is required to be filed "in the taxpayer's return of income for the year" and the election is filed in the taxpayer's return of income before or after the filing due date of the return.

POSITION: No.

REASONS: The law.

September 18, 2013

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2013-048787

Filing Due Date for Elections

We are writing in response to your email of May 6, 2013 concerning the filing due date for various elections that are required to be filed in the taxpayer's return of income for the year under Part I of the Income Tax Act (the "Act") and whether we agree with your interpretation of the various election provisions under Part I of the Act.

Your View

Where a provision of the Act requires a taxpayer to make an election in the taxpayer's return of income for the year under Part I there is no "filing-due date" for the election other than the criterion that the election be filed with the return of income for that year under Part I. However, if such an election is filed separately from the taxpayer's return of income for that year, the election is considered to be late-filed.

Our Comments

As noted in your inquiry, a number of provisions of the Act and Income

Tax Regulation 600 require that certain elections be filed with the return of income, while other provisions require certain elections be filed by the “filing-due date”.

The term “filing-due date” is defined in subsection 248(1) of the Act to mean the day that is on or before which the taxpayer’s return of income under Part I for the year is required to be filed or would be required to be filed if tax under that Part were payable. Where the provisions of the Act use the term “filing-due date” there is an explicit filing-due date required by that provision.

The courts have established that the meaning of the words “in the taxpayer’s return of income” are clear and unambiguous and therefore require that the election must be made in the original return of income. For instance, in *Hayes v. R.*, 2005 D.T.C. 5373, the Federal Court of Appeal opined (in paragraphs 113 – 115) that where an election is required to be filed in the taxpayer’s return of income for the year, such an election would not be considered late-filed if the election was filed with a return of income for that year that was late-filed. As well, the courts have held that where an election that is required to be filed with the return of income for the year is not filed with the return of income, the election would be late.

Under subsection 220(3.2) of the Act and section 600 of the Income Tax Regulations, the Minister may extend the time for making an election. However, a late-filing penalty provided by subsection 220(3.5) will apply to an election that is late-filed. It is our position that for the purpose of calculating the late-filing penalty under subsection 220(3.5), the date the election is required to be filed is the date that the return of income for the year was actually filed and not the filing-due date for the particular return of income for the year.

Therefore, where an election that is required to be filed in the taxpayer’s return of income for the year is not filed with that return of income but rather is filed later, that election, if accepted by the Minister, is technically considered to be late-filed, even if the election is filed before the filing due date of the particular return of income.

However, as indicated in Rulings document 2012-046598, it may not be possible to make such an election in an electronically filed return of income. As such, the CRA might want to consider what form of administrative relief, if any, should be provided in such circumstances.

Yours truly,

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