

the shareholder is also liable for interest on the amount due, pursuant to section 6601, determined for the period beginning on the due date (without extensions) for the taxpayer's income tax return for the year in which the termination date falls and ending on the date the late purging election is filed with the IRS.

(ii) *Filing instructions.* A late purging election is made by filing a completed Form 8621-A, "Return by a Shareholder Making Certain Late Elections to End Treatment as a Passive Foreign Investment Company."

(4) *Time and manner of making late election*—(i) *Time for making a late purging election.* A shareholder may make a late purging election in the manner provided in paragraph (e)(4)(ii) of this section at any time. The date the election is filed with the IRS will determine the amount of interest due under paragraph (e)(3) of this section.

(ii) *Manner of making a late purging election.* A shareholder makes a late purging election by completing Form 8621-A in the manner required by that form and this section and filing that form with the Internal Revenue Service, DP 8621-A, Ogden, UT 84201.

(5) *Multiple late elections.* For rules regarding the circumstances under which a shareholder of a foreign corporation may make multiple late purging elections under this paragraph (e) or § 1.1297-3(e), see § 1.1297-3(e)(5).

(f) *Effective/applicability date.* The rules of this section are applicable as of December 8, 2005.

[T.D. 9231, 70 FR 72915, Dec. 8, 2005, as amended by T.D. 9360, 72 FR 54824, Sept. 27, 2007]

INCOME AVERAGING

§ 1.1301-1 Averaging of farm and fishing income.

(a) *Overview.* An individual engaged in a farming or fishing business may make a farm income averaging election to compute current year (election year) income tax liability under section 1 by averaging, over the prior three-year period (base years), all or a portion of the individual's current year electible farm income as defined in paragraph (e) of this section. Electible farm income includes income from both farming and fishing businesses. An individual who

makes a farm income averaging election—

(1) Designates all or a portion of the individual's electible farm income for the election year as elected farm income; and

(2) Determines the election year section 1 tax by calculating the sum of—

(i) The section 1 tax that would be imposed for the election year if taxable income for the year were reduced by elected farm income; plus

(ii) The amount by which the section 1 tax would be increased if taxable income for each base year were increased by one-third of elected farm income.

(b) *Individual engaged in a farming or fishing business*—(1) *In general*—(i) *Farming or fishing business.* "Farming business" has the same meaning as provided in section 263A(e)(4) and the regulations under that section. *Fishing business* means the conduct of commercial fishing as defined in section 3 of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1802(4)). Accordingly, a fishing business is fishing in which the fish harvested are intended to or do enter commerce through sale, barter, or trade. *Fishing* means the catching, taking, or harvesting of fish; the attempted catching, taking, or harvesting of fish; any activities that reasonably can be expected to result in the catching, taking, or harvesting of fish; or any operations at sea in support of or in preparation for the catching, taking, or harvesting of fish. Fishing does not include any scientific research activity conducted by a scientific research vessel. *Fish* means finfish, mollusks, crustaceans, and all other forms of marine animal and plant life, other than marine mammals and birds. *Catching, taking, or harvesting* includes activities that result in the killing of fish or the bringing of live fish on board a vessel.

(ii) *Exxon Valdez settlement payments.* For purposes of this section, a qualified taxpayer who receives qualified settlement income in any taxable year is treated as engaged in a fishing business, and the income is treated as income attributable to a fishing business, for that taxable year. A *qualified taxpayer* is an individual plaintiff in the civil action *In re Exxon Valdez*, No. 89-

095-CV (HRH) (Consolidated) (D. Alaska). *Qualified taxpayer* also means any individual who is a beneficiary of the estate of such a plaintiff, was the spouse or immediate relative of that plaintiff, and acquired the right to receive the settlement income from that plaintiff. *Qualified settlement income* means any interest and punitive damage awards that are received in connection with the civil action *In re Exxon Valdez* (whether as lump-sum or periodic payments, whether pre- or post-judgment, and whether related to a settlement or to a judgment) and that are otherwise includible in income.

(iii) *Form of business*. An individual engaged in a farming or fishing business includes a sole proprietor of a farming or fishing business, a partner in a partnership engaged in a farming or fishing business, and a shareholder of an S corporation engaged in a farming or fishing business. Except as provided in paragraph (e)(1)(i) of this section, services performed as an employee are disregarded in determining whether an individual is engaged in a farming or fishing business for purposes of section 1301 of the Internal Revenue Code.

(iv) *Base years*. An individual is not required to have been engaged in a farming or fishing business in any of the base years in order to make a farm income averaging election.

(2) *Certain landlords*. A landlord is engaged in a farming business for purposes of section 1301 with respect to rental income that is based on a share of production from a tenant's farming business and, with respect to amounts received on or after January 1, 2003, is determined under a written agreement entered into before the tenant begins significant activities on the land. A landlord is not engaged in a farming business for purposes of section 1301 with respect to either fixed rent or, with respect to amounts received on or after January 1, 2003, rental income based on a share of a tenant's production determined under an unwritten agreement or a written agreement entered into after the tenant begins significant activities on the land. Whether the landlord materially participates in the tenant's farming business is irrelevant for purposes of section 1301.

(3) *Lessors of vessels used in fishing*. A lessor of a vessel is engaged in a fishing business for purposes of section 1301 with respect to payments that are received under the lease and are based on a share of the catch from the lessee's use of the vessel in a fishing business (or a share of the proceeds from the sale of the catch) if this manner of payment is determined under a written lease agreement entered into before the lessee begins any significant fishing activities resulting in the catch. A lessor of a vessel is not engaged in a fishing business for purposes of section 1301 with respect to fixed lease payments or with respect to lease payments based on a share of the lessee's catch (or a share of the proceeds from the sale of the catch) if the share is determined under either an unwritten agreement or a written agreement entered into after the lessee begins significant fishing activities resulting in the catch.

(c) *Making, changing, or revoking an election*—(1) *In general*. A farm income averaging election is made by filing Schedule J, "Income Averaging for Farmers and Fishermen," with an individual's Federal income tax return for the election year (including a late or amended return if the period of limitation on filing a claim for credit or refund has not expired).

(2) *Changing or revoking an election*. An individual may change the amount of the elected farm income in a previous election or revoke a previous election if the period of limitations on filing a claim for credit or refund has not expired for the election year.

(d) *Guidelines for calculation of section 1 tax*—(1) *Actual taxable income not affected*. Under paragraph (a)(2) of this section, a determination of the section 1 tax for the election year involves a computation of the section 1 tax that would be imposed if taxable income for the election year were reduced by elected farm income and taxable income for each of the base years were increased by one-third of elected farm income. The reduction and increases required for purposes of this computation do not affect the actual taxable income for either the election year or the base years. Thus, for each of those

years, the actual taxable income is taxable income determined without regard to any hypothetical reduction or increase required for purposes of the computation under paragraph (a)(2) of this section. The following illustrates this principle:

(i) Any reduction or increase in taxable income required for purposes of the computation under paragraph (a)(2) of this section is disregarded in determining the taxable year in which a net operating loss carryover or net capital loss carryover is applied.

(ii) The net section 1231 gain or loss and the character of any section 1231 items for the election year is determined without regard to any reduction in taxable income required for purposes of the computation under paragraph (a)(2) of this section.

(iii) The section 68 overall limitation on itemized deductions for the election year is determined without regard to any reduction in taxable income required for purposes of the computation under paragraph (a)(2) of this section. Similarly, the section 68 limitation for a base year is not recomputed to take into account any allocation of elected farm income to the base year for such purposes.

(iv) If a base year had a partially used capital loss, the remaining capital loss may not be applied to reduce the elected farm income allocated to the year for purposes of the computation under paragraph (a)(2) of this section.

(v) If a base year had a partially used credit, the remaining credit may not be applied to reduce the section 1 tax attributable to the elected farm income allocated to the year for purposes of the computation under paragraph (a)(2) of this section.

(2) *Computation in base years*—(i) *In general.* As provided in paragraph (a)(2)(ii) of this section, the election year section 1 tax includes the amounts by which the section 1 tax for each base year would be increased if taxable income for the year were increased by one-third of elected farm income. For this purpose, all allowable deductions (including the full amount of any net operating loss carryover) are taken into account in determining the taxable income for the base year even if the deductions exceed gross income

and the result is negative. If the result is negative, however, any amount that may provide a benefit in another taxable year is added back in determining base year taxable income. Amounts that may provide a benefit in another year include—

(A) The net operating loss (as defined in section 172(c)) for the base year;

(B) The net operating loss for any other year to the extent carried forward from the base year under section 172(b)(2); and

(C) The capital loss deduction allowed for the base year under section 1211(b)(1) or (2) to the extent such deduction does not reduce the capital loss carryover from the base year because it exceeds adjusted taxable income (as defined in section 1212(b)(2)(B)).

(ii) *Example.* The rules of this paragraph (d)(2) are illustrated by the following example:

Example. In 2001, F and F's spouse on their joint return elect to average \$24,000 of income attributable to a farming business. One-third of the elected farm income, \$8,000, is added to the 1999 base year income. In 1999, F and F's spouse reported adjusted gross income of \$7,300 and claimed a standard deduction of \$7,200 and a deduction for personal exemptions of \$8,250. Therefore, their 1999 base year taxable income is $-\$8,150$ [$\$7,300 - (\$7,200 + \$8,250)$]. After adding the elected farm income to the negative taxable income, their 1999 base year taxable income would be zero [$\$8,000 + (-\$8,150) = -\$150$]. If F and F's spouse elected to income average in 2002, and made the adjustments described in paragraph (d)(3) of this section to account for the 2001 election, their 1999 base year taxable income for the 2002 election would be $-\$150$.

(3) *Effect on subsequent elections*—(i) *In general.* The reduction and increases in taxable income assumed in computing the election year section 1 tax (within the meaning of paragraph (a)(2) of this section) for an election year are treated as having actually occurred for purposes of computing the election year section 1 tax for any subsequent election year. Thus, if a base year for a farm income averaging election is also an election year for another farm income averaging election, the increase in the section 1 tax for that base year is determined after reducing taxable income by the elected farm income

from the earlier election year. Similarly, if a base year for a farm income averaging election is also a base year for another farm income averaging election, the increase in the section 1 tax for that base year is determined after increasing taxable income by elected farm income allocated to the year from the earlier election year.

(ii) *Example.* The rules of this paragraph (d)(3) are illustrated by the following example:

Example. (i) T is a fisherman who uses the calendar taxable year. In each of the years 2007, 2008, and 2009, T's taxable income is \$20,000, none of which is electible farm income. In 2010, T has taxable income of \$30,000 (prior to any farm income averaging election), \$10,000 of which is electible farm income. T makes a farm income averaging election with respect to \$9,000 of the electible farm income for 2010. Under paragraph (a)(2)(ii) of this section, \$3,000 of elected farm income is allocated to each of the base years 2007, 2008, and 2009. Under paragraph (a)(2) of this section, T's 2010 tax liability is the sum of the following amounts:

(A) The section 1 tax on \$21,000, which is T's taxable income of \$30,000, minus elected farm income of \$9,000.

(B) For each of the base years 2007, 2008, and 2009, the amount by which the section 1 tax would be increased if one-third of elected farm income were allocated to each year. The amount for each year is the section 1 tax on \$23,000 (T's taxable income of \$20,000, plus \$3,000, which is one-third of elected farm income for the 2010 election year), minus the section 1 tax on \$20,000.

(ii) In 2011, T has taxable income of \$50,000, \$12,000 of which is electible farm income. T makes a farm income averaging election with respect to all \$12,000 of the electible farm income for 2011. Under paragraph (a)(2)(ii) of this section, \$4,000 of elected farm income is allocated to each of the base years 2008, 2009, and 2010. Under paragraph (a)(2) of this section, T's 2011 tax liability is the sum of the following amounts:

(A) The section 1 tax on \$38,000, which is T's taxable income of \$50,000, minus elected farm income of \$12,000.

(B) For each of the base years 2008 and 2009, the amount by which section 1 tax would be increased if, after adjustments for previous farm income averaging elections pursuant to paragraph (d)(3)(i) of this section, one-third of 2011 elected farm income were allocated to each year. The amount for each year is the section 1 tax on \$27,000 (T's taxable income of \$20,000 increased by \$3,000 for T's 2010 farm income averaging election and further increased by \$4,000, which is one-third of elected farm income for the 2011 election year), minus the section 1 tax on \$23,000 (T's tax-

able income of \$20,000 increased by \$3,000 for T's 2010 farm income averaging election).

(C) For base year 2010, the amount by which section 1 tax would be increased if, after adjustments for previous farm income averaging elections pursuant to paragraph (d)(3)(i) of this section, one-third of elected farm income were allocated to that year. This amount is the section 1 tax on \$25,000 (T's 2010 taxable income of \$30,000 reduced by \$9,000 for T's 2010 farm income averaging election and increased by \$4,000, which is one-third of elected farm income for the 2011 election year), minus the section 1 tax on \$21,000 (T's taxable income of \$30,000 reduced by \$9,000 for T's 2010 farm income averaging election).

(4) *Deposits into Merchant Marine Capital Construction Fund—(i) Reductions to taxable income and electible farm income.* Under section 7518(c)(1)(A), certain deposits to a Merchant Marine Capital Construction Fund (CCF) reduce taxable income for purposes of the Internal Revenue Code (the CCF reduction). The amount of the CCF reduction is limited under section 7518(a)(1)(A) to the taxpayer's taxable income (determined without regard to the reduction) attributable to specified maritime operations including operations in fisheries of the United States. The CCF reduction is taken into account in determining the taxable income used in computations under this section. In addition, except to the extent the amount described in section 7518(a)(1)(A) is not attributable to the individual's fishing business, the CCF reduction is treated in computing electible farm income as an item of deduction attributable to the individual's fishing business.

(ii) *Example.* The rules of this paragraph (d)(4) are illustrated by the following example:

Example. (i) T is a fisherman who uses the calendar taxable year. In each of the years 2007, 2008, and 2009, T's taxable income (before taking any CCF reduction into account) is \$20,000. For taxable year 2008, all of T's income is described in section 7518(a)(1)(A) and is attributable to T's fishing business. T makes a \$5,000 deposit into a CCF for taxable year 2008. In 2010, T has total taxable income of \$30,000 (before taking any CCF reduction into account). T's electible farm income for 2010 (before taking the CCF reduction into account) is \$10,000, all of which is described in section 7518(a)(1)(A) and is attributable to T's fishing business. For taxable year 2010, T makes a \$4,000 deposit into a CCF.

(ii) The amount of the 2010 CCF deposit reduces taxable income. Accordingly, T's taxable income for 2010 is \$26,000 (\$30,000-\$4,000). In addition, the entire amount of the CCF reduction is treated as an item of deduction attributable to T's fishing business. Accordingly, T's electible farm income for 2010 is \$6,000 (\$10,000-\$4,000). Similarly, the amount of the 2008 CCF deposit reduces T's taxable income for 2008. Accordingly, T's taxable income for 2008 is \$15,000 (\$20,000-\$5,000).

(iii) T makes an income averaging election with respect to all \$6,000 of the electible farm income for 2010. Under paragraph (a)(2)(ii) of this section, \$2,000 of elected farm income is allocated to each of the base years 2007, 2008, and 2009. Under paragraph (a)(2) of this section, T's 2010 tax liability is the sum of the following amounts:

(A) The section 1 tax on \$20,000, which is T's taxable income of \$26,000 (\$30,000 reduced by the \$4,000 CCF deposit), minus elected farm income of \$6,000.

(B) For each of the base years 2007, 2008, and 2009, the amount by which section 1 tax would be increased if one-third of elected farm income were allocated to each year. The amount for base years 2007 and 2009 is the section 1 tax on \$22,000, (T's taxable income of \$20,000, plus \$2,000, which is one-third of elected farm income for the election year), minus the section 1 tax on \$20,000. The amount for base year 2008 is the section 1 tax on \$17,000, which is T's taxable income of \$15,000 (\$20,000 reduced by the \$5,000 CCF deposit), plus \$2,000 (one-third of elected farm income for the election year), minus the section 1 tax on \$15,000.

(e) *Electible farm income*—(1) *Identification of items attributable to a farming or fishing business*—(i) *In general*. Farm and fishing income includes items of income, deduction, gain, and loss attributable to an individual's farming or fishing business. Farm and fishing losses include, to the extent attributable to a farming or fishing business, any net operating loss carryover or carryback or net capital loss carryover to an election year. Income, gain, or loss from the sale of development rights, grazing rights, and other similar rights is not treated as attributable to a farming business. In general, farm and fishing income does not include compensation received as an employee. However, a shareholder of an S corporation engaged in a farming or fishing business may treat compensation received from the corporation as farm or fishing income if the compensation is paid by the corporation in the conduct of the farming or fishing business.

If a crewmember on a vessel engaged in commercial fishing (within the meaning of section 3 of the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. 1802(4)) is compensated by a share of the boat's catch of fish or a share of the proceeds from the sale of the catch, the crewmember is treated for purposes of section 1301 as engaged in a fishing business and the compensation is treated for such purposes as income from a fishing business.

(ii) *Gain or loss on sale or other disposition of property*—(A) *In general*. Gain or loss from the sale or other disposition of property that was regularly used in the individual's farming or fishing business for a substantial period of time is treated as attributable to a farming or fishing business. For this purpose, the term *property* does not include land, but does include structures affixed to land. Property that has always been used solely in the farming or fishing business by the individual is deemed to meet both the regularly used and substantial period tests. Whether property not used solely in the farming or fishing business was regularly used in the farming or fishing business for a substantial period of time depends on all of the facts and circumstances.

(B) *Cessation of a farming or fishing business*. If gain or loss described in paragraph (e)(1)(ii)(A) of this section is realized after cessation of a farming or fishing business, the gain or loss is treated as attributable to a farming or fishing business only if the property is sold within a reasonable time after cessation of the farming or fishing business. A sale or other disposition within one year of cessation of the farming or fishing business is presumed to be within a reasonable time. Whether a sale or other disposition that occurs more than one year after cessation of the farming or fishing business is within a reasonable time depends on all of the facts and circumstances.

(2) *Determination of amount that may be elected farm income*—(i) *Electible farm income*. (A) The maximum amount of income that an individual may elect to average (electible farm income) is the sum of any farm and fishing income and gains, minus any farm and fishing

deductions or losses (including loss carryovers and carrybacks) that are allowed as a deduction in computing the individual's taxable income.

(B) Individuals conducting both a farming business and a fishing business must calculate electible farm income by combining income, gains, deductions, and losses derived from the farming business and the fishing business.

(C) Except as otherwise provided in paragraph (d)(4) of this section, the amount of any CCF reduction is treated as a deduction from income attributable to a fishing business in calculating electible farm income.

(D) Electible farm income may not exceed taxable income, and electible farm income from net capital gain attributable to a farming or fishing business may not exceed total net capital gain. Subject to these limitations, an individual who has both ordinary income and net capital gain from a farming or fishing business may elect to average any combination of the ordinary income and net capital gain.

(ii) *Examples.* The rules of this paragraph (e)(2) are illustrated by the following examples:

Example 1. A has ordinary income from a farming business of \$200,000 and deductible expenses from a farming business of \$50,000. A's taxable income is \$150,000 (\$200,000 - \$50,000). Under paragraph (e)(2)(i) of this section, A's electible farm income is \$150,000, all of which is ordinary income.

Example 2. B has capital gain of \$20,000 that is not from a farming or fishing business, capital loss from a farming business of \$30,000, and ordinary income from a farming business of \$100,000. Under section 1211(b), B's allowable capital loss is limited to \$23,000. B's taxable income is \$97,000 ((\$20,000 - \$23,000) + \$100,000). B has a capital loss carryover from a farming business of \$7,000 (\$30,000 total loss - \$23,000 allowable loss). Under paragraph (e)(2)(i) of this section, B's electible farm income is \$77,000 (\$100,000 ordinary income from a farming business, minus \$23,000 capital loss from a farming business), all of which is ordinary income.

Example 3. C has ordinary income from a fishing business of \$200,000 and ordinary loss from a farming business of \$60,000. C's taxable income is \$140,000 (\$200,000 - \$60,000). Under paragraph (e)(2)(i)(B) of this section, C must deduct the farm loss from the fishing income in determining C's electible farm income. Therefore, C's electible farm income is \$140,000 (\$200,000 - \$60,000), all of which is ordinary income.

Example 4. D has ordinary income from a farming business of \$200,000 and ordinary loss of \$50,000 that is not from a farming or fishing business. D's taxable income is \$150,000 (\$200,000 - \$50,000). Under paragraph (e)(2)(i)(D) of this section, electible farm income may not exceed taxable income. Therefore, D's electible farm income is \$150,000, all of which is ordinary income.

Example 5. E has capital gain from a farming business of \$50,000, capital loss of \$40,000 that is not from a farming or fishing business, and ordinary income from a farming business of \$60,000. E's taxable income is \$70,000 ((\$50,000 - \$40,000) + \$60,000). Under paragraph (e)(2)(i)(D) of this section, electible farm income may not exceed taxable income, and electible farm income from net capital gain attributable to a farming or fishing business may not exceed total net capital gain. Therefore, E's electible farm income is \$70,000 of which \$10,000 is capital gain and \$60,000 is ordinary income.

(f) *Miscellaneous rules—(1) Short taxable year—(i) In general.* If a base year or an election year is a short taxable year, the rules of section 443 and the regulations thereunder apply for purposes of calculating the section 1 tax.

(ii) *Base year is a short taxable year.* If a base year is a short taxable year, elected farm income is allocated to such year for purposes of paragraph (a)(2) of this section after the taxable income for such year has been annualized.

(iii) *Election year is a short taxable year.* In applying paragraph (a)(2) of this section for purposes of determining tax computed on the annual basis (within the meaning of section 443(b)(1)) for an election year that is a short taxable year—

(A) The taxable income and the electible farm income for the year are annualized; and

(B) The taxpayer may designate all or any part of the annualized electible farm income as elected farm income.

(2) *Changes in filing status.* An individual is not prohibited from making a farm income averaging election solely because the individual's filing status is not the same in an election year and the base years. For example, an individual who is married and files a joint return in the election year, who filed as single in one or more of the base years, may elect to average farm or fishing income, by using the single filing status to compute the increase in

section 1 taxes for the base years in which the individual filed as single.

(3) *Employment tax.* A farm income averaging election has no effect in determining the amount of wages for purposes of the Federal Insurance Contributions Act (FICA), the Federal Unemployment Tax Act (FUTA), and the Collection of Income Tax at Source on Wages (Federal income tax withholding), or the amount of net earnings from self-employment for purposes of the Self-Employment Contributions Act (SECA).

(4) *Alternative minimum tax.* A farm income averaging election is disregarded in computing the tentative minimum tax and the regular tax under section 55 for the election year or any base year. The election is taken into account, however, in determining the regular tax liability under section 53(c) for the election year.

(5) *Unearned income of minor child.* In an election year, if a minor child's investment income is taxable under section 1(g) and a parent makes a farm income averaging election, the tax rate used for purposes of applying section 1(g) is the rate determined after application of the election. In a base year, however, the tax on a minor child's investment income is not affected by a farm income averaging election.

(g) *Effective/applicability date.* This section applies for taxable years beginning after December 15, 2010. See the provisions of §§ 1.1301-1 and 1.1301-1T as in effect on December 14, 2010 for rules that apply for taxable years beginning on or before December 15, 2010. In addition, a taxpayer may apply paragraph (b)(1)(ii) of this section in taxable years beginning after December 31, 2003.

[T.D. 8972, 67 FR 819, Jan. 8, 2002; 67 FR 5203, Feb. 5, 2002; T.D. 9417, 73 FR 42523, July 22, 2008; T.D. 9509, 75 FR 78157, Dec. 15, 2010]

READJUSTMENT OF TAX BETWEEN YEARS AND SPECIAL LIMITATIONS

MITIGATION OF EFFECT OF LIMITATIONS AND OTHER PROVISIONS

§ 1.1311(a)-1 Introduction.

(a) Part II (section 1311 and following), subchapter Q, chapter 1 of the Code, provides certain rules for the correction of the effect of an erroneous

treatment of an item in a taxable year which is closed by the statute of limitations or otherwise, in cases where, in connection with the ascertainment of the tax for another taxable year, it has been determined that there was an erroneous treatment of such item in the closed year.

(b) In most situations falling within this part the correction of the effect of the error on a closed year can be made only if either the Commissioner or the taxpayer has taken a position in another taxable year which is inconsistent with the erroneous treatment of the item in the closed year. If a refund or credit would result from the correction of the error in the closed year, then the Commissioner must be the one maintaining the inconsistent position. For example, if the taxpayer erroneously included an item of income on his return for an earlier year which is now closed and the Commissioner successfully requires it to be included in a later year, then the correction of the effect of the erroneous inclusion of that item in the closed year may be made since the Commissioner has maintained a position inconsistent with the treatment of such item in such closed year. On the other hand, if an additional assessment would result from the correction of the error in the closed year, then the taxpayer must be the one maintaining the inconsistent position. For example, if the taxpayer deducted an item in an earlier year which is now closed and he successfully contends that the item should be deducted in a later year, then the correction of the effect of the erroneous deduction of that item in the closed year may be made since the taxpayer has taken a position inconsistent with the treatment of such item in such earlier year.

(c) There are two special circumstances which fall within this part but which do not require that an inconsistent position be maintained. One of these circumstances relates to the inclusion of an item of income in the correct year and the other relates to the allowance of a deduction in the correct year. In the first situation, if the Commissioner takes the position by a deficiency notice or before the Tax Court