



DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

OFFICE OF
CHIEF COUNSEL

Number: **200123061**
Release Date: 6/8/2001
CC:INTL:Br2
SPR-131859-00
UIL: 565.00-00
6081.00-00
6151.00-00

April 22, 2001

MEMORANDUM FOR Gary Nakao, Acting I.R.S. Taxpayer Advocate
Honolulu, Hawaii

FROM: Valerie Mark, Assistant to the Branch Chief, CC:INTL:Br2

SUBJECT: Clarification of June 15, 2000 Memorandum

On June 15, 2000, we issued a memorandum (see attached) in reference to consent dividends paid by a personal holding company to its shareholder. Specifically, the taxpayer declared a consent dividend to its shareholders under section 565 of the Internal Revenue Code. All the shareholders signed the proper consents (Form 972 - Consent of Shareholder to Include Specific Amount in Gross income). The taxpayer filed the consents and Form 973 (Corporate Claim for Deduction for Consent Dividends) with its Form 1120 on September 12, 1997, pursuant to an extension to file.

Some of the taxpayer's shareholders are foreign persons. The taxpayer included a payment of 30% percent of the amount of the consent dividends attributable to the foreign shareholders with its Form 1120. Because the taxpayer had already filed its 1996 Form 1042, it filed an amended return to report the consent dividends on September 12, 1997. The Philadelphia Service Center assessed a late payment penalty and interest charge on the amount shown on the amended 1996 Form 1042 from the due date, March 15, 1997, until the date the tax was actually paid. The taxpayer subsequently requested assistance from your office maintaining that the penalty and interest charges were improperly imposed. For the reasons discussed in the attached memorandum, we concluded that the assessments were proper. The taxpayer has now raised certain concerns with respect to our conclusion. The following responds specifically to those concerns.

1. An extension of time to file is never an extension of time to pay tax.

The taxpayer asserts that there is no connection between section 565(e), the regulations under that section, and revenue ruling 78-296, on the one hand, and the

conclusion in the memorandum that an extension of time to file does not extend the requirement to timely pay the requisite tax, on the other.

The June 15th memorandum contained the following analysis. Section 565(e) provides that the tax shall accompany the Form 972. Code section 565(a) provides that the Form 972 shall accompany the taxpayer's Form 1120. The due date for filing a corporate tax return for a calendar year taxpayer is March 15th. However, section 1.6081-3(a) of the Income Tax Regulations provides that, if certain requirements are met, a corporation is allowed an automatic extension of that time to September 15th. Among the requirements is the duty to "make a remittance, on or before the date prescribed for payment, of the amount of the properly estimated unpaid tax liability." § 1.6081-3(a)(3). Therefore, notwithstanding the extension to file, the taxpayer must ensure that its tax liability is fully satisfied by the actual return filing date.

The taxpayer argues that, in the present case, § 1.6081-3(a)(3) does not apply because the tax remitted is not the corporation's tax but, rather, the tax of the individual foreign shareholders in such corporation. To support this argument, the taxpayer notes that the section 565(e) payment is intended to be analogous to a withholding tax under section 1441.

Section 1441 of the Code imposes a 30% tax on the payment of U.S. source dividends to foreign persons. For purposes of section 1441 withholding, the cash method of accounting is utilized. Accordingly, until there is an actual payment, no tax is due. Once a payment is made, the tax is imposed and both the foreign shareholder and the corporation, as the withholding agent, are liable.

We agree that the amount of the tax under section 565(e) is determined by analogy to section 1441. Thus, the tax remitted will be credited against the amount the shareholder would have owed had an actual dividend been paid. However, because an actual dividend is not paid, there is no liability imposed for nonpayment of the tax. Instead, the consent is simply invalidated. In such a circumstance, the corporation loses its deduction. In other words, the IRS has no recourse against the shareholder if the corporation fails to remit the tax with the consent. The tax is paid by the corporation in order to receive a benefit and, as such, it is its tax.

2. Section 6151 requires a taxpayer to remit all taxes due by the due date of a return without regard to an extension to file.

Supporting the conclusion above, section 6151 of the Code provides that—

Except as otherwise provided in this subchapter, when a return of tax is required under this title or regulations, **the person required to make such return** shall, without assessment or notice and demand from the Secretary, pay such tax to the internal revenue office with whom the return is filed, and shall pay such tax at the

time and place fixed for filing the return (***determined without regard to any extension of time for filing the return***) (*emphasis added*).

As delineated above, the tax imposed on consent dividends “paid” to foreign shareholders must accompany the consent. That consent, in turn, must be filed with the corporation’s Form 1120. The corporation, as the person required to make the return, must pay the tax by the due date of the return, determined without regard to extensions. Neither the Code, nor the corresponding regulations, permit an extension of time to remit this tax. Thus, the IRS does not have the authority to grant an extension of time to remit a tax due. Accordingly, the tax was properly due on the original due date for filing of a Form 1120 -- March 15th.

I hope this information is useful. If you have any questions or need additional information, please do not hesitate to contact Laurie Hatten-Boyd at (202) 622-3164.

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