

Internal Revenue Service

Department of the Treasury

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Washington, DC 20224

Person to Contact:

Telephone Number:

Refer Reply To:
CC:ITA:2, PLR-104126-03
Date: May 15, 2003

LEGEND:

Taxpayer =
Date1 =
Date2 =
Year1 =
Year2 =
Year3 =
Year4 =
Shareholder1 =
Shareholder2 =
Bank =
FirmA =
A =
B =

Dear _____ :

This responds to your letter of January 10, 2003, requesting an extension of time, under §§ 301.9100-1 and -3 of the Procedure and Administration Regulations, for Taxpayer to make consent dividend elections pursuant to § 565 of the Internal Revenue Code.

Taxpayer uses an annual accounting period ending Date1 and utilizes the accrual method as its overall method of accounting. Taxpayer was formed by Shareholder1, in Date2, Year1. Taxpayer deposited its initial cash contributions with Bank in a money market portfolio and other interest-bearing accounts. In early Year2, Shareholder1 transferred all of the stock of Taxpayer to Shareholder2 as a gift. Shareholder2 was a resident alien at Date1, Year2.

Taxpayer engaged FirmA to prepare its U.S. federal income tax returns. Based on its investment income and closely-held ownership, Taxpayer has been a personal holding company (PHC) within the meaning of § 542(a) since its inception. The status of Taxpayer as a PHC has always been recognized and understood by Taxpayer, Shareholder1, Shareholder2, and FirmA.

For the year ending Date1, Year2, Taxpayer attempted to distribute all of its PHC income through a combination of regular dividends, throwback dividends under § 563(b), and a consent dividend election under § 565(a). For the year ending Date1, Year3, Taxpayer attempted to distribute all of its PHC income through regular dividends and throwback dividends. However, due to errors made by FirmA in preparing Taxpayer's financial statements and federal income tax returns, Taxpayer's income was understated by amounts A and B for the taxable years ended Date1, Year2 and Year3, respectively. The errors, in large part, were caused by FirmA incorrectly processing data received on monthly statements from Bank. Also, in Year3, a monthly statement from Bank contained pages that did not relate to Taxpayer, which contributed to FirmA's understatement of Taxpayer's Year3 income. FirmA ultimately discovered the errors in Year4.

Taxpayer requests the Commissioner's consent to extend the due date to make consent dividend elections under § 565 on Forms 972 and 973 for Taxpayer in the amounts of A and B for the taxable years ended Date1, Year2 and Year3, respectively.

Section 565(a) provides that if any person owns consent stock (as defined in § 565(f)(1)) in a corporation on the last day of the taxable year of such corporation, and such person agrees, in a consent filed with the return of such corporation in accordance with the regulations, to treat as a dividend the amount specified in such consent, the amount so specified shall, except as provided in § 565(b), constitute a consent dividend for purposes of § 561 (relating to the deduction for dividends paid).

Section 1.565-1(a) of the Income Tax Regulations provides that the dividends paid deduction, as defined in § 561, includes the consent dividends for the taxable year. A consent dividend is a hypothetical distribution (as distinguished from an actual distribution) made by certain corporations to any person who owns consent stock on the last day of the taxable year of such corporation and who agrees to treat the hypothetical distribution as an actual dividend, subject to specified limitations, by filing a consent at the time and in the manner specified in §1.565-1(b). Section 1.565-1(b)(3) provides that a consent may be filed not later than the due date of the corporation's income tax return for the taxable year for which the dividends paid deduction is claimed. Under Rev. Rul. 78-296, 1978-2 C.B. 183, the due date for purposes of §1.565-1(b)(3) includes the extended due date of a return filed pursuant to an extension of the time to file.

Section 301.9100-3 of the Procedure and Administration Regulations generally provides extensions of time for making regulatory elections. For this purpose, § 301.9100-1(b) defines the term "regulatory election" to include an election whose deadline is prescribed by a revenue ruling, revenue procedure, notice, or announcement published in the Internal Revenue Bulletin.

Section 301.9100-3(a) provides, in part, that requests for relief will be granted when the taxpayer provides evidence (including affidavits described in § 301.9100-3(e)) to establish to the satisfaction of the Commissioner that the taxpayer acted reasonably and in good faith, and the grant of relief will not prejudice the interests of the government.

Section 301.9100-3(b)(1) provides, in part, that except as otherwise provided (in § 301.9100-3(b)(3)(i) through (iii)), a taxpayer is deemed to have acted reasonably and in good faith if the taxpayer (i) requests relief before failure to make the regulatory election is discovered by the Service; or (v) reasonably relied on a qualified tax professional and the tax professional failed to make, or advise the taxpayer to make the election.

Taxpayer represents that at the time this request was filed, Taxpayer had not been contacted by the Internal Revenue Service with respect to an examination of its returns. To the best of the knowledge of Taxpayer and FirmA, this request for relief was filed before the failure to make the proper elections was discovered by the Service. The affidavit presented shows that Taxpayer acted reasonably and in good faith, having relied on FirmA to prepare its returns during the tax years at issue.

Section 301.9100-3(b)(3) provides, in part, that a taxpayer is deemed to have not acted reasonably and in good faith if the taxpayer (i) seeks to alter a return position for which an accuracy-related penalty has been or could be imposed under § 6662 at the time the taxpayer requests relief (taking into account § 1.6664-2(c)(3) of the Income Tax Regulations) and the new position requires or permits a regulatory election for which relief is requested; (ii) was informed in all material respects of the required election and related tax consequences, but chose not to file the election; or (iii) uses hindsight in requesting relief. In connection with hindsight, if specific facts have changed since the due date for making the election that make the election advantageous to the taxpayer, the Service will not ordinarily grant relief. In such a case, the Service will grant relief only when the taxpayer provides strong proof that the taxpayer's decision to seek relief did not involve hindsight.

In the present case, Taxpayer is not attempting to alter a return position taken for which a penalty has been or could be imposed under § 6662. In addition, there is no indication that Taxpayer is using hindsight, as defined above, in requesting this relief. Specific facts material to the issue under consideration have not changed since the due date for making the elections that make the elections advantageous to Taxpayer.

Section 301.9100-3(c)(1)(i) provides, in part, that the interests of the government are prejudiced if granting relief would result in the taxpayer having a lower tax liability in the aggregate for all taxable years affected by the election than the taxpayer would have had if the election had been timely made (taking into account the time value of money).

Section 301.9100-3(c)(1)(ii) provides, in part, that the interests of the 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.

In the present case, granting the relief requested will not prejudice the interests of the government under the given criteria. Taken together, the disclosed circumstances indicate that the omission Taxpayer now seek to correct originated from an honest mistake on the part of its tax advisors, and not from a desire to avoid taxes. Granting this application will not prejudice the interests of the government.

Accordingly, the consent of the Commissioner is hereby granted for an extension of time to file the forms necessary to make the § 565 consent dividend elections for each of the years Taxpayer has requested. This extension shall be for a period of 45 days from the date of this ruling. Please attach a copy of this ruling to the returns, schedules and forms filed in connection with making the election under § 565 when such forms are filed. We enclose a copy of the letter for this purpose. Also enclosed is a copy of the letter ruling showing the deletions proposed to be made in the letter when it is disclosed under § 6110 of the Internal Revenue Code.

No opinion is expressed as to the application of any other provision of the Code or the regulations which may be applicable under these facts. This office makes no determination of Taxpayer's status as a PHC and relies on the determination of status as represented in Taxpayer's application for relief. This ruling is directed only to the taxpayer who requested it. Section 6110(j)(3) of the Code provides that a private letter ruling may not be used or cited as precedent.

Sincerely,

Clifford M. Harbourt
Senior Technician Reviewer, Branch 2
Office of Associate Chief Counsel
(Income Tax & Accounting)

Enclosures (2)