

**Internal Revenue Service**

Department of the Treasury  
Washington, DC 20224

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Refer Reply To:  
CC:ITA:2  
PLR-146125-05  
Date: January 9, 2006

In Re:

Taxpayer	=	EIN:
Trust	=	
X	=	
Y	=	
Z	=	
a	=	
b	=	
Address1	=	
\$m	=	

Dear \_\_\_\_\_ :

This letter is in response to a request for ruling of September 2, 2005, submitted on behalf of Taxpayer requesting an extension of time for making an Internal Revenue Code section 565(a) consent dividend election for the taxable year ended

\_\_\_\_\_, pursuant to Treasury Regulation section 301.9100-3. Taxpayer filed a section 565 consent dividend election with its income tax return for its taxable year on \_\_\_\_\_, \_\_\_\_\_ . However, because Taxpayer inadvertently failed to file for an extension of time, the due date of its return and consent dividend election was \_\_\_\_\_. Thus, Taxpayer's income tax return and consent dividend election were not timely filed.

**FACTS**

Taxpayer is a separate series of the Trust, which is registered under the Investment Company Act of 1940, as amended, as an open-end management investment company. Taxpayer commenced operations on \_\_\_\_\_. Pursuant to section 851(g) of the Code, Taxpayer constitutes a separate corporation for federal income tax purposes. Taxpayer represents a separate investment portfolio of the Trust and all

interests in Taxpayer are held directly or indirectly by one or more separate accounts of X and Y, and, except with respect to seed money, all such interests support a and b offered by X and Y.

In accordance with Subchapter M of the Code, Taxpayer in its initial tax year qualified to be treated as a Regulated Investment Company (RIC) and it so elected on its federal income tax return filed for that year. Taxpayer has maintained its election and qualification as a RIC in each tax year thereafter and intends to continue to qualify as a RIC.

The principal office of Taxpayer is located at Address1. Taxpayer maintains its books and records in accordance with the accrual method of accounting and reports its taxable income on IRS Form 1120-RIC on the basis of a fiscal year ending November 30.

The Trust, on behalf of Taxpayer (and all other series of the Trust), has entered into an administrative agreement with X. The agreement provides, among other things, that X will prepare or supervise the preparation by third parties of, inter alia, all federal tax returns. Under the terms of the agreement, X may contract with other entities to assist it in providing such services. The Tax Department of Z, the parent corporation of X, has responsibility for the preparation and filing of all IRS returns that must be filed by Z's subsidiaries, including X. Accordingly, the Z Tax Department prepares and files all IRS returns for Taxpayer, as well as the other series funds of the Trust. The Z Tax Department currently employs a number of qualified tax professionals, including ten Certified Public Accountants and one tax attorney who is also a Certified Public Accountant.

At the time the filing in question was due in \_\_\_\_\_, the Z Tax Department had a procedure in place designed to ensure that filings would be made in a timely manner. Under the procedure, each fund had a designated employee of Z responsible for filing its IRS forms and a reviewer responsible for reviewing the file Z maintained with respect to each fund. More specifically, the reviewer, after completing his or her review of a fund's forms to be filed, would be required to sign the fund's file to indicate that the fund's forms were filed properly. If no forms needed to be filed, the reviewer did not sign the file.

For each of the series funds, including Taxpayer, Z routinely files IRS Form 7004 (Application for Automatic Extension of Time to File Corporation Income Tax Return) extending for six months the due date for the corporate income tax return. Then, prior to the due date, as extended, Z files the corporate tax returns for all of the series funds of the Trust, along with IRS Forms 972 and 973, if applicable, relating to the consent dividend election. Except as described below, to date Z has always filed all tax returns for the series funds of the Trust and consent dividend elections on a timely basis.

Thus, the responsibility for preparing and filing all tax returns and forms, including extensions of time, for Taxpayer and the other funds of the Trust rests with Z. In this regard, Z for many years has routinely filed IRS Form 7004 for Taxpayer and the other series of the Trust, requesting an automatic six-month extension of time for filing their tax return. Z intended to do so again with respect to the taxable years of the funds ending in . In the case of Taxpayer, since its taxable year is the fiscal year ending on , the due date for its return for its taxable year was

. All of the other funds of the Trust, however, have a calendar year end for tax purposes, and thus the due date for their returns is

In , Z assigned responsibility for filing IRS Form 7004 for Taxpayer and the other funds of the Trust to a new employee. Although a CPA, the new employee had no prior knowledge or experience with respect to the filing requirements for the Trust, and failed to realize that Taxpayer had a different taxable year than the other funds. As a result, the new employee mistakenly assumed that the federal income tax returns for all the funds of the Trust had the same due date, notwithstanding the fact that the due date for Taxpayer was clearly stated on an electronic calendar (Tax Calendar) that was made available to inform the new employee of the due dates of the forms that the new employee was responsible for filing. As a result of the new employee's misunderstanding about the return due date for Taxpayer and the consequent failure to follow the Tax Calendar, Z failed to file IRS Form 7004 for the taxpayer by the due date. Had Z timely filed IRS Form 7004, the due date for Taxpayer's federal income tax return and the due date for making the consent dividend election would have been automatically extended to

As noted above, Z for years routinely filed IRS Form 7004 for all the funds of the Trust, and until now, Z has always done so in a timely manner.

On or about , an in the Tax Department of Z, asked a Tax Manager in Z's Tax Department to verify that the IRS Form 7004 for Taxpayer had been timely filed. It was at this time that Z discovered that IRS Form 7004 had not been timely filed for Taxpayer. After internal discussions and discussions with outside tax counsel, Z realized that the failure to file IRS Form 7004 timely for Taxpayer meant that Taxpayer could not make a timely consent dividend election for its 2003 taxable year. Based on consultation with outside tax counsel, Z concluded that Taxpayer probably would need to file for relief under Treas. Reg. section 301.9100-3.

In , Z decided to finish calculating the amount of the consent dividend that would be necessary for Taxpayer's taxable year and to finish preparing Taxpayer's tax return before filing for relief. In , Z completed calculating the necessary consent dividend and on , Taxpayer's Board was advised of the planned consent dividend in the amount of \$m. Subsequently, on , Z

filed IRS Form 1120-RIC for Taxpayer, together with the necessary Forms 972 and 973 for the consent dividend election. Immediately afterwards, Z requested outside tax counsel to file with the IRS a request for relief under Treas. Reg. section 301.9100-3. In addition, Z has modified its procedures to reduce the possibility of a failure to file an IRS form timely.

Accordingly, Taxpayer requests the Service grant an extension of time pursuant to section 301.9100-3 for the filing of an amended federal income tax return along with an amended consent dividend election under section 565 of the Code and regulations thereunder.

## LAW AND ANALYSIS

Section 565(a) provides that if any person owns consent stock (as defined in section 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 section 565(b), constitute a consent dividend for purposes of section 561 (relating to the deduction for dividends paid).

Treas. Reg. section 1.565-1(a) provides that the dividends paid deduction, as defined in section 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 section 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 section 1.565-1(b)(3) includes the extended due date of a return filed pursuant to an extension of the time to file.

Section 301.9100-1(c) provides that the Commissioner of Internal Revenue, in exercising his discretion, may grant a reasonable extension of time under the rules set forth in section 301.9100-3 to make a regulatory election under all subtitles of the Internal Revenue Code except subtitles E, G, H, and I. The term "regulatory election" is defined in section 301.9100-1(b) as an election whose due date is prescribed by a regulation published in the Federal Register, or a revenue ruling, revenue procedure, or announcement published in the Internal Revenue Bulletin.

Section 301.9100-3(a) provides that requests for relief subject to this section will be granted when the taxpayer provides the evidence 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.

Under section 301.9100-3(b)(1)(i), except as provided in paragraphs (b)(3)(i) through (iii) of this section, a taxpayer is deemed to have acted reasonably and in good faith if the taxpayer requests relief before the failure to make the regulatory election is discovered by the Service.

Paragraphs (b)(3)(i) through (iii) of section 301.9100-3 provide 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 could be imposed under section 6662 at the time the taxpayer requests relief 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. If specific facts have changed since the due date for making the election that make the election advantageous to a 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.

Section 301.9100-3(c)(1) provides 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. 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.

## CONCLUSION

Under the facts presented, Taxpayer's tardiness in filing its federal income tax return and consent dividend election for taxable year ended \_\_\_\_\_ was not due to the intentional disregard of the tax rules, but was an inadvertent error on the part of Taxpayer's tax preparer, and Taxpayer did not affirmatively choose not to file the election. Taxpayer is not seeking to alter a return position or to use hindsight to request relief. Finally, Taxpayer acted promptly in filing its request for relief, before the IRS discovered the failure to make a regulatory election. Therefore, Taxpayer did not act unreasonably or in bad faith.

Furthermore, granting relief will not result in Taxpayer having a lower tax liability in the aggregate for the taxable year affected by the election than Taxpayer would have had if the election had been timely made, nor will any closed year be affected. Therefore, the interests of the government will not be prejudiced by granting the request for relief.

Because Taxpayer acted reasonably and in good faith, and because the interests of the government will not be prejudiced if the request for relief is granted, Taxpayer is granted an extension of 45 days from the date of this ruling to file an amended federal income tax return along with an amended consent dividend election for the taxable year ended

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter. In particular, no opinion is expressed with regard to whether Taxpayer qualifies as a RIC under subchapter M of the Code.

The ruling contained in this letter is based upon facts and representations submitted by the taxpayer. Except as specifically addressed herein, no opinion is expressed regarding the tax treatment of the subject transactions under the provisions of any other sections of the Code or regulations that may be applicable thereto. This ruling is directed only to the taxpayer(s) requesting it. Section 6110(k)(3) of the Code provides that a private letter ruling may not be used or cited as precedent.

A copy of this letter must be attached to any income tax return to which it is relevant. 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 section 6110. In accordance with the power of attorney on file in our office, a copy of this letter is being sent to your representative(s).

Sincerely yours,

ROBERT M. BROWN  
Associate Chief Counsel  
(Income Tax & Accounting)

By: Clifford M. Harbourt  
CLIFFORD M. HARBOURT  
Senior Technician Reviewer  
Branch 2

cc: