

Internal Revenue Service

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Department of the Treasury

Washington, DC 20224

Third Party Communication: None

Date of Communication: Not Applicable

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Date:

January 29, 2008

Legend

Fund A =

Fund B =

State A =

State B =

Accountant =

Manager =

Date 1 =

Date 2 =

Date 3 =

Date 4 =

Date 5 =

Date 6 =

Date 7 =

Year 1 =

Dear :

This is in reply to a letter requesting a ruling on behalf of Fund A and Fund B (collectively referred to as "Funds"). You have requested a ruling that Fund A and Fund B be granted an extension of time under § 301.9100 of the Procedure and Administration Regulations to make an election under § 855(a) of the Internal Revenue Code for the tax years ended Date 1 and Date 4, respectively.

FACTS

Funds are registered under the Investment Company Act of 1940, 15 U.S.C. § 80a-1, et seq., as amended, and are incorporated in State A with their principal place of business in State B. Funds have elected to be taxed as regulated investment companies (RICs) under subchapter M, part I, of Chapter 1 of the Internal Revenue Code.

Funds have previously elected annually to apply the provisions of § 855. Consistent with their practice in all previous years, the officers of Funds, in conjunction with Accountant, computed investment company taxable income and net capital gain for Funds' tax years ending Date 1 and Date 4 and reflected the amounts in the audited financial statements. Thus, the dividends subject to the election under § 855 were determined and approved by Fund A and Fund B's officers no later than Date 3 and Date 5, respectively, when the financial statements were available to be released.

Furthermore, Fund B's treasurer prepared a memorandum dated Date 5 stating that the undistributed capital gains as of Date 4 will be paid out during the Year 1 year end distributions. Similarly, during Fund A's Date 2 Board of Director's meeting a resolution was made "that a Section 855 dividend is hereby declared with respect" to Fund A.

It was the intent of both Fund A and Fund B to file a Form 7004, Application for Automatic 6-Month Extension of Time to File Certain Business Income Tax, Information, and Other Returns, to extend the due date of each Fund's Form 1120-RIC, U.S. Income Tax Return for Regulated Investment Companies.

Funds' tax preparer, Accountant, was engaged to prepare required extensions and transmit them to Manager as Investment Manager to Funds, for review and filing with the taxing authorities. The employee of Accountant who normally prepared the Forms 7004 rotated off of Funds' team and was replaced by a new senior associate who was not aware of the need to prepare the forms. Simultaneously, a new tax manager assumed responsibility for the client engagement and, due to a lack of communication, the preparation of the Forms 7004 was overlooked.

Accountant discovered the failure to file the Forms 7004 on Date 6 and notified Funds on Date 7. The Forms 7004 were prepared by Accountant and filed by Funds immediately upon learning of the failure.

Funds make the following additional representations:

1. The request for relief was filed by Funds before the failure to make the regulatory election was discovered by the Service.
2. Granting the relief requested will not result in Funds having a lower tax liability in the aggregate for all years to which the regulatory election applies than the liability Funds would have had if the election had been timely made (taking into account the time value of money).
3. Funds did not seek to alter a return position for which an accuracy-related penalty has been or could have been imposed under § 6662 of the Code at the time Funds requested relief and the new position requires or permits a regulatory election for which relief is requested.
4. Being fully informed of the required regulatory election and related tax consequences, Funds did not choose to not file the election.

LAW AND ANALYSIS

Section 855(a) provides, in part, that if a RIC declares a dividend prior to the time prescribed by law for the filing of its return for a tax year (including the period of any extension of time granted for filing such return), and distributes the amount of the dividend to shareholders in the 12-month period following the close of such tax year and not later than the date of the first regular dividend payment made after the declaration, the amount so declared and distributed shall, to the extent the RIC elects in such return in accordance with regulations prescribed by the Secretary, be considered as having been paid during such tax year, except as provided otherwise by § 855.

Any distribution made from income and gains of the previous year made no later than the first distribution from income and gains of the current tax year is not considered the "first regular dividend payment" under § 855(a). Rev. Rul. 69-445, 1969-2 C.B.148. In addition, Rev. Rul. 76-328, 1976-2 C.B. 216, holds that the "first regular dividend payment" under § 855(a) is the first dividend payment which exceeds the remaining

undistributed earnings and profits of the previous year or for which no election under § 858(a) was made. The language of § 858(a), applying to real estate investment trusts, parallels the language of § 855(a).

Section 1.855-1(b)(1) of the Income Tax Regulations provides that a § 855(a) election must be made in the return filed by the RIC for the tax year.

Section 301.9100-1(c) provides, in part, that the Commissioner has discretion to grant a reasonable extension of time to make a regulatory election (defined in § 301.9100-1(b) as an election whose due date is prescribed by regulations or by a revenue ruling, a revenue procedure, a notice, or an announcement published in the Internal Revenue Bulletin), or a statutory election (but no more than 6 months except in the case of a taxpayer who is abroad), under all subtitles of the Internal Revenue Code except subtitles E, G, H, and I.

Sections 301.9100-3(a) through (c)(1)(i) set forth rules that the Internal Revenue Service generally will use to determine whether, under the facts and circumstances of each situation, the Commissioner will grant an extension of time for regulatory elections that do not meet the requirements of § 301.9100-2. Section 301.9100-3(b) provides that subject to paragraphs (b)(3)(i) through (iii) of § 301.9100-3, when a taxpayer applies for relief under this section before the failure to make the regulatory election is discovered by the Service, the taxpayer will be deemed to have acted reasonably and in good faith; and § 301.9100-3(c) 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 years to which the regulatory election applies than the taxpayer would have had if the election had been timely made (taking into account the time value of money).

CONCLUSION

Based on the facts and representations submitted, we conclude that Funds have satisfied the requirements for our granting a reasonable extension of time to allow them to make the election under § 855(a). Accordingly, Fund A and Fund B are granted an extension of time to make the election under § 855(a) on the federal income tax return filed for the tax years ended Date 1 and Date 4, respectively.

This ruling is limited to providing an extension of time for filing a § 855(a) election and does not provide relief from any liability incurred as a result of filing a late return. Except as specifically ruled upon herein, we express no opinion concerning any federal excise or income tax consequences relating to the facts herein under any other section of the Code. For example, we express no opinion as to whether Funds, in fact, have satisfied all of the requirements of § 855 and the regulations thereunder. We also

express no opinion as to whether Funds qualify as RICs under subchapter M, part I, of Chapter 1 of the Code.

Further, no opinion is expressed as to whether Funds' tax liability is not lower in the aggregate for the year to which the regulatory election applies than Funds' tax liability would have been if the election had been timely made (taking into account the time value of money). Upon audit of the federal income tax return involved, the district director's office will determine Funds' tax liabilities for the years involved. If the district director's office determines either Fund A or Fund B's liability is lower, that office will determine the federal income tax effect.

This ruling is directed only to the taxpayers who requested it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

Sincerely yours,

/S/

Elizabeth A. Handler
Chief, Branch 1
Office of Associate Chief Counsel
(Financial Institutions & Products)