Internal Revenue Service

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Department of the Treasury
Washington, DC 20224

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Person To Contact:
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Refer Reply To:
CC:ITA:B03
PLR-102408-10

Date:
May 18, 2010

TY:

Legend

Taxpayer	=
Year 1	=
Year 2	=
Year 3	=
Trust	=
Husband	=
Wife	=
President	=
Tax Program	=

Dear

This is in response to your letter dated . In your letter, you requested an extension of time to file the forms necessary to make a consent dividend election under § 565 of the Internal Revenue Code for the tax year ending December 31, Year 1. The request is based on §§ 301.9100-1 and 301.9100-3 of the Procedure and Administrative Regulations.

FACTS

Taxpayer is engaged in private financing and lending transactions. Taxpayer was incorporated in Year 1, and has issued one class of common stock. In Year 1, all the stock was owned by Trust, a revocable living trust established by Husband and Wife. The President of Taxpayer is a certified public accountant and the son-in-law of Husband and Wife.

At the time Taxpayer was formed, consideration was given as to whether it should be a C corporation or an S corporation. Taxpayer did not make an S election to be effective for Year 1, so it treated itself as a C corporation for Year 1.

The President prepared Taxpayer's income tax return for Year 1 on Form 1120, U.S. Corporation Income Tax Return. The President used a commercial computer based tax program (Tax Program) to prepare the return. The President thought the return would be simple and straightforward because the only source of income was interest, and there were insignificant expenses. However, when the President used the Tax Program it triggered the personal holding company calculation. The President had no knowledge of personal holding company status or the related issues. On May 10, Year 2, the President filed the return and paid the personal holding company tax based on the Tax Program calculation.

Prior to filing the return for Year 1, the President determined that it would be prudent for Taxpayer to become an S corporation. On February 27, Year 2, Taxpayer filed Form 2553, Election by a Small Business Corporation. This election was effective January 1, Year 2. Taxpayer would have preferred to become an S corporation effective when it was incorporated in January of Year 1. Due to the timing of the filing of the election, it became effective January 1 of Year 2. Taxpayer was unaware that there were methods available to file a valid late S corporation election with its initial tax filing.

In late October of Year 3, the President met with tax advisors in order to plan for Year 3 and to prepare for Year 3 tax filings. During that process, the tax advisors reviewed Taxpayer's prior tax filings (Years 1 and 2) and raised the issues of the personal holding company status and the consent dividends, Taxpayer was advised that a consent dividend election is available to corporations that are personal holding companies in order to eliminate the personal holding company tax. Until this meeting Taxpayer was unaware of the availability of a consent dividend election.

If Taxpayer had known about the availability of consent dividend election at the time its tax return for Year 1 was filed, it would have used this to eliminate the personal holding company tax for Year 1. When these potential tax problems were identified by Taxpayer's tax advisors, Taxpayer and its advisors submitted this ruling request.

Taxpayer represents that it requested relief before the failure to make the regulatory election was discovered by the Internal Revenue Service.

LAW AND ANALYSIS

Section 565 of the Code 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). Consent stock, which is the type of stock with respect to which consent dividends are allowed (section 565(a)), includes what is generally known as common stock and participating preferred stock, the participation rights of which are unlimited (§1.565-6(a)(1) of the Income Tax Regulations).

Section 1.565-6(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 §1.565-6(b).

Section 1.565-1(b)(3) provides that a consent may be filed no 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 time to file.

Sections 301.9100-1 through 301.9100-3 of the Procedure and Administration Regulations provide the standards the Commissioner uses to determine whether to grant an extension of time to make a regulatory election. Section 301.9100-2 provides automatic extensions of time for making certain elections. Section 301.9100-3 provides extensions of time for making elections that do not meet the requirements of Section 301.9100-2.

Section 301.9100-1(b) defines the term "regulatory election" as an election whose due date is prescribed by a regulation published in the Federal Register, or a revenue ruling, procedure, notice or announcement published in the Internal Revenue Bulletin.

Section 301.9100-1(c) provides that the Commissioner may grant a reasonable extension of time to make a regulatory election, or a statutory election (but no more than six 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.

Section 301.9100-3 provides extensions of time to make a regulatory election under Code sections other than those for which § 301.9100-2 expressly permits automatic extensions. Requests for extensions of time for regulatory elections will be granted when the taxpayer provides evidence (including affidavits described in the regulations) to establish to the satisfaction of the Commissioner that the taxpayer acted

reasonably and in good faith and granting relief will not prejudice the interests of the government.

Section 301.9100-3(b)(1) states that a taxpayer will be deemed to have acted reasonably and in good faith if the taxpayer –

(i) requests relief before the failure to make the regulatory election is discovered by the Service;

(ii) inadvertently failed to make the election because of intervening events beyond the taxpayer's control;

(iii) failed to make the election because, after exercising due diligence, the taxpayer was unaware of the necessity for the election;

(iv) reasonably relied on the written advice of 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.

Under § 301.9100-3(b)(3), a taxpayer will not be considered to have 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 § 1.6664-02(c)(3)) and the new position requires 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 original deadline that make the election advantageous to a taxpayer, the Service will not ordinarily grant relief.

Taxpayer in this case requested relief before the failure to make the regulatory election was discovered by the Service, and, thus, under section 301.9100-3(b)(1)(i), the Taxpayers will be deemed to have acted reasonably and in good faith.

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.

Under these criteria, the interests of the government are not prejudiced in this case. Taxpayer has represented that granting relief would not result in 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). Furthermore, the taxable year in which the regulatory election should have been made and any taxable years that would have been affected had it been timely made, are not closed by the period of assessment.

CONCLUSION

Taxpayer's election is a regulatory election, as defined under § 301.9100-1(b), because the due date of the election is prescribed in the regulations under § 1.565-1(b). In the present situation, the requirements of §§ 301.9100-1 and 301.9100-3(b)(i) of the regulations have been satisfied. The information and representations made by Taxpayer establish that Taxpayer acted reasonably and in good faith with this request. Furthermore, granting an extension will not prejudice the interests of the Government. It is represented that Taxpayer will not have a lower tax liability in the aggregate for all taxable years affected by the election if given permission to make the election than Taxpayer would have if the election were made by the original deadline for making the election. Accordingly, Taxpayer is granted an extension of time for making the election until 60 days following the date of this ruling. The election should be made by filing the forms necessary to make the § 565 consent dividend election for the taxable Year 1, and by including a copy of this ruling with an amended return for Year 1.

Except as expressly provided herein, no opinion is expressed or implied concerning the federal income tax consequences of any aspect of any transaction or item discussed or referenced in this ruling.

This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to your authorized representative.

A copy of this letter must be attached to any income tax return to which it is relevant. Alternatively, taxpayers filing their returns electronically may satisfy this requirement by attaching a statement to their return that provides the date and control number of the letter ruling.

The rulings contained in this letter are based upon information and representations submitted by the taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. While this office has not verified any of the material submitted in support of the request for rulings, it is subject to verification on examination.

Sincerely,

Christopher F. Kane
Branch Chief, Branch 3
(Income Tax & Accounting)

Enclosure (2)