

**Internal Revenue Service**

Department of the Treasury

Washington, DC 20224

Number: **201135015**

Release Date: 9/2/2011

Index Number: 9100.00-00

Third Party Communication: None

Date of Communication: Not Applicable

Person To Contact:

, ID No.

Telephone Number:

Refer Reply To:

CC:ITA:B03

PLR-106178-11

Date:

May 16, 2011

TY:

LEGEND:

Taxpayer =

Parent =

Subsidiary =

Fund Group =

Year 1 =

Extended Due Date =

Discovery Date =

Dear :

This is in response to your letter dated February 10, 2011. In your letter, you requested an extension of time to file the forms necessary to make a consent dividend election under section 565 of the Internal Revenue Code for the tax year ending December 31, Year 1. The request is based on sections 301.9100-1 and 301.9100-3 of the Procedure and Administrative Regulations.

**FACTS**

Taxpayer, a corporation, is a regulated investment company owned by Parent and Subsidiary, and is a member of Parent's Fund Group. Parent administers the various funds in the Fund Group. Parent and Subsidiary hold shares of each of the funds in the Fund Group in separate accounts established for the purpose of funding variable annuity contracts and variable life insurance policies. Investors in Parent and Subsidiary may select one of the funds in the Fund Group, including Taxpayer, as an investment option for a variable annuity contract or life insurance policy. Taxpayer must make minimum distributions each tax year to continue to be subject to tax as a regulated investment company for future tax years.

Parent prepared Taxpayer's Form 1120-RIC, U.S. Income Tax Return for Regulated Investment Companies, for the tax year ending December 31, Year 1, and filed it before the Extended Due Date. Before filing Taxpayer's Form 1120-RIC, the Board of Directors approved Taxpayer's issuance of consent dividends to Parent, Subsidiary to satisfy the Taxpayer's Year 1 distribution requirements. Parent's employees had no prior experience issuing consent dividends. After consulting outside accountants and lawyers, Parent's employees prepared an internal memorandum outlining the process of how funds in the Fund Group should issue consent dividends and the tax consequences of issuing them. The memorandum stated that Parent needed to file a Form 973, Corporation Claim for Deduction for Consent Dividends, with each Form 1120-RIC of each fund in the Fund Group. But the memorandum did not mention the additional regulatory requirement that Parent file a Form 972, Consent of Shareholder to Include Specific Amount in Gross Income, with each fund's return for each consent dividend paid to a different shareholder of Taxpayer.

Time passed between when Parent's employees prepared the memorandum and when they began preparing the Forms 1120-RIC for each fund in the Fund Group. When Parent prepared Form 1120-RIC on behalf of Taxpayer, Parent's employees followed the memorandum's instructions. Thus, Taxpayer's return included an executed Form 973 with the filing, but not any executed Forms 972. The Forms 972 were not attached even though Parent's employees possessed two executed originals of Form 972, one authorizing the inclusion of consent dividends in Parent's gross income, and the other authorizing the inclusion of consent dividends in Subsidiary's gross income. Taxpayer's shareholders, Parent and Subsidiary, each included the appropriate amount of consent dividend income in their respective gross incomes on Parent's consolidated income tax return for Year 1.

After the Extended Due Date but before the Discovery Date, Parent's auditor discovered that no Forms 972 had been attached to Taxpayer's Form 1120-RIC. To Taxpayer's knowledge, the IRS was not aware of the omission of the Form 972 and has not contacted Parent about the Year 1 consent dividend election, nor has it notified Parent that Taxpayer's Year 1 Form 1120-RIC is under examination.

## LAW AND ANALYSIS

Section 852(b)(2)(D) provides that a regulated investment company may claim a deduction for dividends paid (as defined in section 561) in computing its investment company taxable income.

Section 852(b)(3)(A) provides that a regulated investment company may claim a deduction for dividends paid (as defined in section 561) in computing its net capital gains (determined with reference to capital gain dividends only).

Section 561(a)(2) provides that the deduction for dividends paid includes consent dividends for the taxable year as determined under section 565.

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 (section 1.565-6(a)(1) of the Income Tax Regulations).

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 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. With such return, and not later than the due date, the corporation must file Forms 972 for each consenting shareholder, and a return on Form 973 showing by classes the stock outstanding on the first and last days of the taxable year, the dividend rights of such stock, distributions made during the taxable years to shareholders, and give all other information required by the form. 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 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 section 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) 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 section 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 section 6662 at the time the taxpayer requests relief (taking into account section 1.6664-2(c)(3)) 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 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 Taxpayer will be deemed to have acted reasonably and in good faith. Taxpayer has also represented that none of the circumstances listed in section 301.9100-3(b)(3) apply.

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 section 6501(a) before the taxpayer's receipt of a ruling granting relief.

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 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 section 301.9100-1(b), because the due date of the election is prescribed in the regulations under section 1.565-1(b). In the present situation, the requirements of sections 301.9100-1 and 301.9100-3(b)(1)(i) of the regulations have been satisfied. The information and representations made by Taxpayer establish that Taxpayer acted reasonably and in good faith. Furthermore, granting an extension will not prejudice the interests of the Government. Taxpayer represented that it 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. Taxpayer also represented that the period of assessment for Year 1 will not be closed before receipt of a ruling. Accordingly, Taxpayer is granted an extension of time for making the election to issue consent dividends until 60 days following the date of this ruling. The election should be made by filing the forms necessary to make the section 565 consent dividend election for Year 1, and by including a copy of this ruling with an amended return for Year 1.

This ruling is limited to the timeliness of the consent dividend election Taxpayer wishes to make for Year 1. This ruling's application is limited to the facts, representations, Code sections, and regulations cited herein.

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,

Robert Casey  
Acting Branch Chief, Branch 3  
(Income Tax & Accounting )