Internal Revenue Service

Number: **201623005**
Release Date: 6/3/2016

Index Numbers: 9100.00-00, 475.06-00, 475.07-00

Department of the Treasury
Washington, DC 20224

Third Party Communication: None
Date of Communication: Not Applicable

Person To Contact:
, ID No.
Telephone Number:

Refer Reply To:
CC:FIP:B03
PLR-129697-15

Date:
February 22, 2016

Legend:

Taxpayer =

Entity A =

Entity B = .

Parent =

Country =

Date 1 =

Date 2 =

Date 3 =

Date 4 =

Date 5 =

Date 6 =

Dear :

This responds to a letter dated August 19, 2015, and subsequent correspondence submitted on behalf of Taxpayer, requesting that the Internal Revenue Service ("Service") grant Taxpayer an extension of time under § 301.9100-3 of the

Procedure and Administration Regulations to elect the use of the mark-to-market method of accounting under Internal Revenue Code ("Code") sections 475(e) and (f).

FACTS

On Date 1, Entity A acquired from an unrelated party all of the outstanding equity interests in Taxpayer, an entity formed under the laws of Country. At the time of the transaction, Entity B was the parent entity of Entity A. On Date 2, Parent acquired all of the shares of Entity B. Taxpayer was treated as a disregarded entity for U.S. federal tax purposes from the time of its acquisition by Entity A on Date 1 until Date 3, the effective date of an election that was made to treat Taxpayer as a corporation for U.S. federal tax purposes.

Taxpayer made section 475(e) and (f) elections effective as of Date 4 and has used the mark-to-market method of accounting for U.S. federal tax purposes with respect to its positions in commodities (within the meaning of section 475(e)(2)). When the election was made to treat Taxpayer as a corporation for U.S. federal tax purposes, Taxpayer became a new taxpayer for U.S. federal income tax purposes. Thus, Taxpayer was required to timely make new section 475(e) and (f) elections to be able to continue to properly use the mark-to-market method of accounting for its positions in commodities.

When the decision was made during Date 5 to elect to treat Taxpayer as a corporation for U.S. federal tax purposes, it was also decided that the effective date of that election would be made retroactive to Date 3, 75 days before the date the Form 8832, Entity Classification Election, was filed on Taxpayer's behalf. Inadvertently, the need to make new section 475(e) and (f) elections for Taxpayer within 75 days of the first day on which Taxpayer was treated as a corporation for U.S. federal tax purposes was not considered at the time the decision to treat Taxpayer as a corporation was made. On Date 6, the inadvertent oversight was discovered by employees of Parent, and they began preparing the request for relief under § 301.9100-3.

LAW AND ANALYSIS

Under § 301.7701-3(g)(1)(iv), if an eligible entity that is disregarded as an entity separate from its owner elects under § 301.7701-3(c)(1)(i) to be classified as an association, the owner of the eligible entity is deemed to contribute all of the assets and liabilities of the entity to the association in exchange for stock of the association. Therefore, when Taxpayer made the election to be treated as a corporation for U.S. federal tax purposes, it was treated as a new taxpayer for U.S. federal income tax purposes starting on Date 3.

Because Taxpayer will be treated as a new taxpayer, it is requesting permission to make late elections to adopt a method of accounting for commodities under sections

475(e) and (f) rather than late elections to change its method of accounting for commodities.

Section 475(e) provides that a dealer in commodities may elect to apply the mark-to-market method of accounting to commodities held by such dealer. Section 475(f) provides that a taxpayer engaged in a trade or business as a trader in commodities may elect to apply the mark-to-market method of accounting to commodities held in connection with such trade or business. *See* section 475(f)(1) and (2). Section 7805(d) provides that, except to the extent otherwise provided by the Code, any election shall be made at such time and in such manner as the Secretary shall prescribe.

On February 16, 1999, the Internal Revenue Service published Rev. Proc. 99-17, 1999-1 C.B. 503 (Section 6 superseded by Rev. Proc. 2015-13, 2015-5 I.R.B. 419, in conjunction with Rev. Proc. 2015-14, 2015-5 I.R.B. 450). Rev. Proc. 99-17 provides the exclusive procedure for dealers in commodities and traders in securities or commodities to make an election to use the mark-to-market method of accounting under section 475(e) or (f). This revenue procedure applies both to existing taxpayers who are changing to the mark-to-market method of accounting for securities or commodities and to new taxpayers who are adopting that method.

Section 5.03(2) of Rev. Proc. 99-17 provides, in relevant part, that a new taxpayer (for which no federal income tax return was required to be filed for the taxable year immediately preceding the election year) may make an election under section 475(e) or (f) for a tax year beginning on or after January 1, 1999, by placing in its books and records no later than two months and 15 days from the first day of the election year a statement that describes the election being made, the first taxable year for which the election is effective, and the trade or business for which the election is made. To notify the Service that the election was made, the new taxpayer must attach a copy of the statement to its original federal income tax return for the election year.

Section 4 of Rev. Proc. 99-17 provides that the election under section 475(e) or (f) determines the method of accounting an electing taxpayer is required to use for federal income tax purposes for securities or commodities subject to the election. A method of accounting for securities or commodities subject to the election is impermissible unless the method is in accordance with section 475 and the regulations thereunder. If an electing taxpayer's method of accounting for its taxable year immediately preceding the election year is inconsistent with section 475, the taxpayer is required to change its method of accounting to comply with its election. Thus, a taxpayer that makes a section 475(e) or (f) election but fails to change its method of accounting to comply with that election is using an impermissible method.

Section 6.03 of Rev. Proc. 99-17 provides that a taxpayer that changes its method of accounting pursuant to Rev. Proc. 99-17 must take into account the net amount of the section 481(a) adjustment.

Section 301.9100-1(c) of the regulations provides, in part, that the Commissioner has discretion to grant a reasonable extension of time to make a regulatory election, 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 Code except subtitles E, G, H, and I. A regulatory election is defined in § 301.9100-1(b) as an election whose due date is prescribed by regulations published in the Federal Register, or by a revenue ruling, revenue procedure, notice, or announcement published in the Internal Revenue Bulletin.

Sections 301.9100-3(a) through (c)(1)(ii) set forth rules that the 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 section 301.9100-2 for an automatic extension. 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 either 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) or the taxable year in which a timely regulatory election should have been made is closed.

Section 301.9100-3(b)(3) describes three situations where a taxpayer is deemed to have not acted reasonably and in good faith. First, under § 301.9100-3(b)(3)(i), a taxpayer seeking to alter a return position for which an accuracy-related penalty has been or could be imposed under section 6662 is not acting reasonably and in good faith. Second, under § 301.9100-3(b)(3)(ii), a taxpayer who was informed in all material respects of the required election and the related tax consequences but chose not to timely file the election is not acting reasonably and in good faith in requesting permission to make a late election. Third, § 301.9100-3(b)(3)(iii) provides that a taxpayer is deemed to have not acted reasonably and in good faith if the taxpayer uses hindsight in requesting relief. 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.

Section 301.9100-3(c)(2) provides special rules for accounting method regulatory elections. This section provides, in relevant parts, that the interests of the Government are deemed to be prejudiced by granting an extension of time, except in unusual and compelling circumstances, in several situations: first, if the accounting method regulatory election is subject to the procedure described in § 1.446-1(e)(3)(i) (requiring the advance written consent of the Commissioner) (*see* § 301.9100-3(c)(2)(i)); second, if the accounting method regulatory election for which relief is requested requires an adjustment under section 481(a) (or would require an adjustment under section 481(a) if

the taxpayer changed to the method of accounting for which relief is requested in a taxable year subsequent to the taxable year the election should have been made) (*see* § 301.9100-3(c)(2)(ii)); third, if the accounting method regulatory election involves certain changes from an impermissible method of accounting (*see* § 301.9100-3(c)(2)(iii)); fourth, if the accounting method regulatory election would provide a more favorable method of accounting or more favorable terms and conditions if the election is made by a certain date or taxable year (*see* § 301.9100-3(c)(2)(iv)).

As noted above, section 4 of Rev. Proc. 99-17 states that an election under section 475(e) or (f) determines the method of accounting an electing taxpayer is required to use for federal income tax purposes for securities or commodities subject to the election. If an electing taxpayer's method of accounting for its taxable year immediately preceding the election year is inconsistent with section 475, the taxpayer is required to change its method of accounting to comply with its election. A taxpayer that makes a section 475(e) or (f) election but fails to change its method of accounting to comply with that election is using an impermissible method. Because the election is integrally related to the change in accounting method to mark-to-market, it is an accounting method regulatory election subject to § 301.9100-3(c)(2).

Rev. Proc. 2015-13, in conjunction with Rev. Proc. 2015-14, provides procedures by which a taxpayer may obtain automatic consent to change to the mark-to-market accounting method. However, the automatic change applies to a taxpayer only if the taxpayer has made a valid election under section 475(e) or (f) by complying with the requirements of Rev. Proc. 99-17 and is required to change its method of accounting to comply with the election. *See* section 23.01(2)(a) of Rev. Proc. 2015-14.

Taxpayer requests an extension of time to make accounting method regulatory elections that are subject to the provisions of § 301.9100-3. Relief under this section of the Regulations will only be granted when a taxpayer provides evidence satisfactory to the Commissioner that the taxpayer acted reasonably and in good faith, and the granting of relief will not prejudice the interests of the Government. If specific facts have changed since the due date for making the elections that make the elections advantageous to Taxpayer, § 301.9100-3(b)(3) provides that the Service will grant relief only when Taxpayer provides strong proof that Taxpayer's decision to seek relief did not involve hindsight. Without such proof Taxpayer is deemed to have not acted reasonably or in good faith.

As described above, Taxpayer, after making the election to be treated as a corporation for U.S. federal tax purposes, was treated as a new taxpayer as of Date 3, the effective date of that election. As such, as of the date of the letter requesting the extension of time to make section 475(e) and (f) elections, Taxpayer had not filed a prior U.S. federal income tax return, nor had it taken any position regarding its method of accounting for commodities. Therefore, because Taxpayer had not filed a prior U.S. federal income tax return, it is not seeking to alter a prior return position, and § 301.9100-3(b)(3)(i) does not apply.

This is also not a case where Taxpayer simply chose not to make timely elections under section 475(e) and (f). As described above, when the decision was made during Date 5 to elect to treat Taxpayer as a corporation for U.S. federal tax purposes, it was also decided that the effective date of that election would be made retroactive to Date 3, 75 days before the date the Form 8832, Entity Classification Election, was filed on Taxpayer's behalf. Taxpayer has submitted affidavits, signed under penalties of perjury, from employees of Parent who would have been responsible for making the elections. These affidavits demonstrate that, at the time the Form 8832 was filed and made effective as of Date 3, Taxpayer was unaware of the need to make new section 475(e) and (f) elections. Therefore § 301.9100-3(b)(3)(ii) does not apply.

Further, Taxpayer represents that it made elections to account for commodities under section 475(e) and (f) that were effective on Date 4. This means that on Date 3, Taxpayer's current method of accounting for commodities was, and had been for years, the section 475 mark-to-market method. Absent Taxpayer's tax entity classification change and Taxpayer's resulting status as a new taxpayer, Taxpayer would have no need to change its method of accounting for commodities because it was already accounting for commodities under section 475. Given these facts, Taxpayer's delay in making the elections to account for commodities under section 475 did not provide Taxpayer with any time to review and consider the results of its commodities trading transactions and whether it would benefit by making the elections because it was already accounting for commodities under section 475. Based upon these facts, Taxpayer did not use hindsight when deciding to request permission to make elections under section 475(e) and (f) and has met the requirements of § 301.9100-3(b)(3)(iii). Therefore, § 301.9100-3(b)(3) does not apply to Taxpayer.

Because Taxpayer was already accounting for commodities under section 475, the change in Taxpayer's entity classification and its request to make a late adoption of mark-to-market accounting for commodities under section 475 will not result in a lower tax liability. Further, we note that the short tax year beginning on Date 3, and all subsequent tax years, are, as of the date of this letter, not closed by the period of limitations on assessment under section 6501(a). Therefore, § 301.9100-3(c)(1) is not applicable.

As provided for in Rev. Proc. 99-17 and Rev. Proc. 2015-13, in conjunction with Rev. Proc. 2015-14, advance written consent of the Commissioner is not required to make an election under 475(e) or (f) assuming all requirements are met. Therefore, § 301.9100-3(c)(2)(i) does not apply. Further, Taxpayer, after making the entity classification election change, was a new taxpayer. Thus, Taxpayer did not have a method of accounting for commodities that it could change, and its adoption of the section 475 mark-to-market method of accounting for commodities will not generate an adjustment to income under section 481(a). Therefore, § 301.9100-3(c)(2)(ii) does not apply.

Section 301.9100-3(c)(2)(iii) is not applicable because Taxpayer is not seeking to change from an impermissible method of accounting.

Finally, because Taxpayer was already accounting for commodities under section 475, Taxpayer's request to make a late adoption of the section 475 mark-to-market method of accounting for commodities will not result in a more favorable method of accounting or provide for more favorable terms and conditions if the election was made by a certain date or taxable year. Therefore, § 301.9100-3(c)(2)(iv) does not apply.

Based on the facts and representations submitted, and because §§ 301.9100-3(b)(3), -3(c)(1), and -3(c)(2) do not apply to Taxpayer, we conclude that Taxpayer has satisfied the requirements for our granting a reasonable extension of time to make elections under section 475(e) and (f) to adopt the mark-to-market method of accounting. To make the election, Taxpayer must, within 90 days of the date of this letter, comply with the requirements of Section 5.03(2) of Rev. Proc. 99-17 and must file a copy of its election statement, a copy of this letter, and an amended federal income tax return for the election year, if needed, with the appropriate service center.

Except as specifically set forth above, no opinion is expressed concerning the federal tax consequences of the facts described above under any other provision of the Code. Further, no opinion is expressed as to whether Taxpayer's elections under section 475(e) and (f), effective as of Date 4, were timely or proper, or whether Taxpayer qualifies as a dealer or trader in commodities.

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

Sincerely,

_____

K. Scott Brown
Branch Chief, Branch 3
Office of Associate Chief Counsel
(Financial Institutions and Products)

Enclosures (2)
Copy of this letter
Copy for § 6110 purposes