

FACTS

Taxpayers, U.S. persons who file a joint U.S. Federal income tax return, owned an interest of less than 10 percent in FC beginning in Year 1. FC is organized in Country X. In Year 3, FC became a passive foreign investment company (“PFIC”) as defined in section 1297(a) of the Code.

From Year 1 through Year 4, Taxpayers relied on Tax Advisor A for tax advice and tax compliance assistance with respect to Taxpayers’ investment in FC. Tax Advisor A was competent to render advice with respect to Taxpayers’ investment in FC. Late in Year 4, after the extended due date for Taxpayers’ Year 3 federal income tax return, Tax Advisor A informed Taxpayers of its belief that FC was a PFIC beginning in Year 3. Prior to this time, Taxpayers did not know or have reason to know that FC was a PFIC. Several months later, Tax Advisor A explained to Taxpayers the possibility of making a retroactive QEF election for Year 3 with the consent of the Commissioner. Therefore, Tax Advisor A failed to advise Taxpayers of FC’s PFIC status and the availability of a QEF election before the due date to make a QEF election with respect to FC for Year 3. Taxpayers then engaged Tax Advisor B to seek the consent of the Commissioner to make a retroactive QEF election with respect to FC effective for Year 3.

Taxpayers submitted affidavits, under penalties of perjury, describing the events that led to the failure to make the QEF election by the election due date.

Taxpayers have paid an amount sufficient to eliminate any prejudice to the United States government as a consequence of their inability to file amended returns, in accordance with a signed closing agreement between Taxpayers and the Commissioner. Further, Taxpayers have agreed to file an amended return for each of the subsequent taxable years affected by the retroactive election, if any.

In addition, Taxpayers represent that, as of the date of their request for ruling, the PFIC status of FC had not been raised by the IRS on audit for any of the taxable years at issue.

RULING REQUESTED

Taxpayers request the consent of the Commissioner to make a QEF election retroactive to Year 3 under Treas. Reg. § 1.1295-3(f) with respect to their investment in FC.

LAW

Section 1295(a) provides that a PFIC will be treated as a QEF with respect to a shareholder if (1) an election by the shareholder under section 1295(b) applies to the PFIC for the taxable year; and (2) the PFIC complies with the requirements prescribed by the Secretary for purposes of determining the ordinary earnings and net capital gains of the company.

Under section 1295(b)(2), a QEF election may be made for a taxable year at any time on or before the due date (determined with regard to extensions) for filing the return for the taxable year. To the extent provided in regulations, the election may be made after the due date if the shareholder failed to make the election by the due date because the shareholder reasonably believed the company was not a PFIC.

Under Treas. Reg. § 1.1295-3(f), a shareholder may request the consent of the Commissioner to make a retroactive QEF election for a taxable year if:

1. the shareholder reasonably relied on a qualified tax professional, within the meaning of Treas. Reg. § 1.1295-3(f)(2);
2. granting consent will not prejudice the interests of the United States government, as provided in Treas. Reg. § 1.1295-3(f)(3);
3. the request is made before a representative of the Internal Revenue Service raises upon audit the PFIC status of the company for any taxable year of the shareholder; and
4. the shareholder satisfies the procedural requirements of Treas. Reg. § 1.1295-3(f)(4).

The procedural requirements include filing a request for consent to make a retroactive election with, and submitting a user fee to, the Office of the Associate Chief Counsel (International). Treas. Reg. § 1.1295-3(f)(4)(i). Additionally, affidavits signed under penalties of perjury must be submitted that describe:

1. the events that led to the failure to make a QEF election by the election due date;
 2. the discovery of the failure;
 3. the engagement and responsibilities of the qualified tax professional; and
 4. the extent to which the shareholder relied on the professional.
- Treas. Reg. § 1.1295-3(f)(4)(ii) and (iii).

CONCLUSION

Based on the information submitted and representations made with Taxpayers' ruling request, we conclude that Taxpayers have satisfied Treas. Reg. § 1.1295-3(f). Accordingly, consent is granted to Taxpayers to make a QEF election for FC, retroactive to Year 3, provided that Taxpayers comply with the rules under Treas. Reg. § 1.1295-3(g) regarding the time and manner for making the retroactive QEF election. We have, consequently, approved a closing agreement with Taxpayers with respect to those issues affecting its tax liability for closed years on the basis set forth above. Pursuant to our practice with respect to such agreements, the agreement contains a stipulation to the effect that any change or modification of applicable statutes enacted subsequent to the date of this agreement and made applicable to the taxable period involved will render the agreement ineffective to the extent that it is dependent upon such statutes.

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.

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.

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.

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

Sincerely,

/s/ Kristine A. Crabtree

Kristine A. Crabtree
Senior Technical Reviewer, Branch 2
Associate Chief Counsel (International)

cc: