

**Internal Revenue Service**

**Department of the Treasury**

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Washington, DC 20224

Person to Contact:

Telephone Number:

Refer Reply To:

CC:ITA:1 – PLR-159949-02

Date: March 18, 2003

In re: Letter Ruling Request Regarding an Extension of Time to Make an Election

LEGEND:

X =

Y =

*Firm A* =

*Firm B* =

*Year 1* =

*Year 2* =

*Year 3* =

Dear **Mr.** :

This is in response to a request for a private letter ruling dated October 30, 2002, submitted by your authorized representative requesting relief under § 301.9100-3 of the Procedure and Administration Regulations to make the consent dividend election under § 565(a) of the Internal Revenue Code.

FACTS:

X, the parent of an affiliated group (the taxpayer) which files a consolidated return, is engaged in the business of providing financial services. Y, the wholly owned subsidiary

PLR-159949-02

of X, was included in the affiliated group's consolidated federal income tax return beginning in *Year 1*.

*Firm A*, is the independent auditor of the consolidated group. Neither X nor Y employ any in-house tax professionals. *Firm B*, provides tax advice to Y and prepared Y's proforma return information to be included on the consolidated return prepared by *Firm A*. Neither *Firm A* nor *Firm B* advised the taxpayer that Y was a personal holding company as defined under § 542(a), that there existed a potential liability for a tax on undistributed personal holding company income under § 541(a), or of the availability or consequences of a consent dividends election under § 565(a).

The taxpayer's consolidated federal income tax return for *Year 1* was filed without declaring the § 565(a) consent dividend election.

In *Year 3*, subsequent to filing the *Year 1* consolidated federal income tax return, *Firm A* recognized Y's status as a personal holding company. Consequently, Forms 972 (Consent of Shareholder to Include Specific Amount in Gross Income) and 973 (Corporation Claim for Deduction of Consent Dividends) declaring the consent dividend election, were filed with the taxpayer's consolidated federal income tax return for *Year 2*.

#### RULING REQUESTED:

That X and Y be granted an extension of time to make a consent dividend election under § 565 for *Year 1*.

#### LAW AND ANALYSIS:

Section 565(a) provides that if any person owns consent stock (as defined in § 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 § 565(b), constitute a consent dividend for purposes of § 561 (relating to the deduction for dividends paid).

Section 1.565-1(a) of the Income Tax Regulations provides that the dividends paid deduction, as defined in § 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 § 1.565-1(b). Section 1.565-1(b)(3) provides that a consent may be filed not later than the due date of the corporation's income tax

PLR-159949-02

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 the time to file.

Section 301.9100-1(c) provides that the Commissioner of Internal Revenue, in exercising his discretion, may grant a reasonable extension of time under the rules set forth in § 301.9100-3 to make a regulatory election under all subtitles of the Internal Revenue Code except subtitles E, G, H, and I. The term "regulatory election" is defined in § 301.9100-1(b) as an election whose due date is prescribed by a regulation published in the Federal Register, or a revenue ruling, revenue procedure, or announcement published in the Internal Revenue Bulletin.

Section 301.9100-3(a) provides that requests for relief subject to this section will be granted when the taxpayer provides the evidence (including affidavits described in § 301.9100-3(e)) to establish to the satisfaction of the Commissioner that the taxpayer acted reasonably and in good faith, and the grant of relief will not prejudice the interests of the government.

Under § 301.9100-3(b)(1)(i), except as provided in paragraphs (b)(3)(i) through (iii) of this section, a taxpayer is deemed to have acted reasonably and in good faith if the taxpayer requests relief before the failure to make the regulatory election is discovered by the Service.

Section 301.9100-3(b)(3)(i), (ii) and (iii) provide that a taxpayer is deemed to have not acted reasonably and in good faith if the taxpayer: (i) seeks to alter a return position for which an accuracy-related penalty could be imposed under § 6662 at the time the taxpayer requests relief 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 due date for making the election that make the election advantageous to a 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.

In the present case, relief was requested before the failure to make the regulatory elections properly was discovered by the Service. Further, the taxpayer is not seeking to alter a return position for which an accuracy-related penalty could have been imposed. Nor was the taxpayer informed of the required elections, but chose not to file the elections. Moreover, there is no indication that the taxpayer is using hindsight in requesting relief. Specific facts material to the issue under consideration have not

PLR-159949-02

changed since the due date for making the elections that make the elections advantageous to the taxpayer.

Section 301.9100-3(c)(1) provides that Commissioner will grant a reasonable extension of time to make a regulatory election only when the interests of the government will not be prejudiced by the granting of relief. Under §301.9100-3(c)(1)(i), 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. Section 301.9100-3(c)(1)(ii) provides 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 § 6501(a) before the taxpayer's receipt of a ruling granting relief under this section.

In this case, the affiliated group will not have a lower tax liability for the taxable year in which the elections apply than it would have had if the elections had been made timely. Also, the taxable year that would be affected by the elections, had they been timely made, is not closed by the period of limitations on assessment.

**RULING:**

The taxpayer is granted an extension of 45 days from the date of this letter within which to execute and file Forms 972 and 973 for *Year 1*.

A copy of this letter must be attached to any income tax return to which it is relevant. We enclose a copy of the letter for this purpose. Also enclosed is a copy of the letter ruling showing the deletions proposed to be made in the letter when it is disclosed under § 6110 of the Internal Revenue Code.

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any item discussed or referenced in this letter. This ruling is directed only to the taxpayer(s) requesting it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

Sincerely,

TAJUANA E. NELSON HYDE  
Assistant Branch Chief  
Office of Associate Chief Counsel  
(Income Tax & Accounting)

Enclosures (2)