

Part III - Administrative, Procedural, and Miscellaneous

Classification of Certain Foreign Entities

Notice 2004-68

This notice announces that Treasury and the Internal Revenue Service (the Service) will amend § 301.7701-2(b)(8) of the Procedure and Administration Regulations to include certain foreign entities on the list of entities always treated as corporations under section 7701 of the Internal Revenue Code.

BACKGROUND

The Service and Treasury issued final regulations concerning the classification of entities under section 7701 on December 18, 1996 (final regulations). See generally TD 8697 (1997-1 C.B. 215) and §§ 301.7701-1 through 3. Under the final regulations, a business entity that is not specifically classified as a corporation is an eligible entity that can elect its classification for federal tax purposes under certain circumstances. However, § 301.7701-2(b)(8) provides a list of certain foreign business entities that are always classified as corporations for federal tax purposes (the per se corporation list). These foreign business entities are generally referred to as per se corporations.

On October 8, 2001, the Council of the European Union adopted Council Regulation 2157/2001 2001 O.J. (L 294) (the EU Regulation) to provide for a new business entity, the European public limited liability company (Societas Europaea or

SE). The EU Regulation will enter into force on October 8, 2004, and will have legal effect in all the Member States of the European Economic Area (which includes all Member States of the European Union plus Norway, Iceland, and Liechtenstein). An SE must have a registered office in one of the Member States.

The SE is a public limited liability company. The EU Regulation provides general rules that govern the formation and operation of an SE, and supplements those rules for specified issues and issues it does not otherwise address by reference to the laws with respect to public limited liability companies for the country in which the SE has its registered office. Most of the countries in which an SE can have its registered office have a business entity that constitutes a public limited liability company and that currently is on the per se corporation list. However, an SE can have its registered office in the following countries that have a business entity that is a public limited liability company but that is not yet on the per se corporation list: Estonia, Latvia, Lithuania, Slovenia, and Liechtenstein.

DISCUSSION

The Service and Treasury have concluded that an SE is properly classified as a per se corporation because it will function as a public limited liability company. The Service and Treasury will issue temporary and proposed regulations that will modify § 301.7701-2(b)(8) to include the SE on the per se corporation list. Further, the temporary and proposed regulations will modify § 301.7701-2(b)(8) to include as per se corporations the Estonian Aktsiaselts, Latvian Akciju Sabiedriba, Lithuanian Akcine Bendroves, Slovenian Delniska Druzba, and Liechtenstein Aktiengesellschaft. These

entities are the public limited liability companies in their respective countries.

The status of an SE may be relevant to the application of various federal income tax provisions, such as the subpart F same-country exception under section 954(c)(3). Treasury and the Service are considering these issues and invite comments on any additional areas in which guidance on the federal tax treatment of an SE may be warranted.

EFFECTIVE DATE

The temporary and proposed regulations to be issued adding the Estonian Aktsiaselts, Latvian Akciju Sabiedriba, Lithuanian Akcine Bendroves, Slovenian Delniska Druzba, and Liechtenstein Aktiengesellschaft to §301.7701-2(b)(8) generally will apply to such entities formed on or after the date of this notice. However, they shall also apply to an entity formed before such date upon a 50 percent or greater change of ownership subsequent to such date. The temporary and proposed regulations to be issued adding the SE to § 301.7701-2(b)(8) will apply to entities formed on or after October 8, 2004.

DRAFTING INFORMATION

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