

Internal Revenue Service

Department of the Treasury
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Person To Contact:
, ID No.

Telephone Number:

Refer Reply To:
CC:ITA:02
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Date:
September 28, 2018

Taxpayer =
Date 1 =
Taxable Year 1 =
Taxable Year 2 =
Subsidiary 1 =
Subsidiary 2 =
Accounting Firm =
CPA =
Year 1 =
Year 2 =

Dear Taxpayer:

This is in response to your letter submitted on Date 1 requesting a ruling that, pursuant to Treas. Reg. §§ 301.9100-1 and 301.9100-3, the Internal Revenue Service grant Taxpayer an extension of time to make a consent dividend election under section 565 by filing Schedule PH, U.S. Personal Holding Company Tax, Form 972, Consent of Shareholder to Include Specific Amount in Gross Income, and Form 973, Corporation Claim for Deduction for Consent Dividends with respect to Taxable Year 1 and Taxable Year 2.

FACTS

Taxpayer represents that the facts are as follows:

Taxpayer timely filed its consolidated Forms 1120 for Taxable Year 1 and Taxable Year 2, which included Subsidiary 1 and Subsidiary 2 as consolidated entities. In Year 1 and Year 2, Subsidiary 2 was deemed to have distributed consent dividends to Subsidiary 1. As a result, Subsidiary 1 would have recognized Personal Holding Company (PHC) income from the deemed receipt of the consent dividends.

Taxpayer engaged Accounting Firm to prepare its Forms 1120 for Taxable Year 1 and Taxable Year 2. Accounting Firm applied the PHC tax analysis at the consolidated level and concluded that PHC tax did not apply to Taxpayer's consolidated returns. Taxpayer represents that it relied on Accounting Firm to advise Taxpayer regarding all statements and other information that should have been included on its tax returns and that Accounting Firm did not advise Taxpayer that it was necessary to make the consent dividend election by filing Schedule PH and Forms 972 and 973 with its Consolidated Forms 1120 for Taxable Years 1 and 2.

During a later review of Taxpayer's Year 1 and Year 2 Forms 1120, Taxpayer's counsel concluded that Accounting Firm should have analyzed Taxpayer's PHC calculation at the individual company level rather than at the consolidated level, pursuant to section 542(b). Accordingly, Taxpayer's counsel concluded that Taxpayer should have made the consent dividend election under section 565 by filing Schedule PH, Form 972, and Form 973 on behalf of Subsidiaries 1 and 2 with its consolidated returns for Taxable Years 1 and 2. So, Taxpayer is seeking relief under Treas. Reg. § 301.9100-3 to make a late consent dividend election.

LAW AND ANALYSIS

Section 565(a) 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 regulations prescribed by the Secretary to treat as a dividend the amount specified in such consent, the amount so specified shall, except as provided in subsection (b), constitute a consent dividend for purposes of section 561 (relating to the deduction for dividends paid).

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 the limitations set forth in section 565, and Treas. Reg. §§ 1.565-2 and 1.565-1(c)(2), by filing a consent at the time and in the manner specified in Treas. Reg. § 1.565-1(b). Under Treas. Reg. § 1.565-1(b)(3) and Rev. Rul. 78-296, 1978-2 C.B. 183, a consent may be filed no later than the extended due date of the corporation's income tax return for the taxable year for which the dividends paid deduction is claimed. As Taxpayer represents that Taxpayer did not file the Schedule PH nor the Forms 972 and 972 with its timely Consolidated Forms 1120 for Taxable Years 1 and 2, Taxpayer did not make a timely consent dividend election for Taxable Years 1 and 2.

Treasury Regulation §§ 301.9100-1 and 301.9100-3 set forth the standards the Commissioner will use to determine whether to grant an extension of time to make a regulatory election. Treasury Regulation § 301.9100-1(b) defines a regulatory election as one with a due date prescribed by a regulation published in the Federal Register, or a revenue ruling, revenue procedure, notice, or announcement published in the Internal Revenue Bulletin. Pursuant to Treas. Reg. § 301.9100-1(c), the Commissioner has discretion to grant a reasonable extension of time under the rules set forth in Treas. Reg. § 301.9100-3 to make a regulatory election. The time to file a consent dividend election is prescribed by regulation, so the consent dividend election is a regulatory election for which relief may be granted under Treas. Reg. § 301.9100-1.

Requests for relief pursuant to Treas. Reg. § 301.9100-3 will be granted when the taxpayer provides evidence (including affidavits described in Treas. Reg. § 301.9100-3(e)) that establishes to the Satisfaction of the Commissioner that the taxpayer acted reasonably and in good faith, and that the grant of relief will not prejudice the interests of the government.

Treasury Regulation § 301.9100-3(b)(1) provides that a taxpayer is 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) inadvertently failed to make the election because of intervening events beyond the taxpayer's control;
- (iii) failed to make the election because, after exercising reasonable diligence (taking into account the taxpayer's experience and the complexity of the return at issue), 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, including a tax professional employed by the taxpayer, and the taxpayer failed to make, or to advise the taxpayer to make, the election.

Taxpayer represents that it acted reasonably and in good faith because it requested relief before the failure to make the election was discovered by the Service and because Taxpayer reasonably relied on Accounting Firm, a group of qualified tax professionals, who failed to advise Taxpayer of the need and method for making the election.

Treasury Regulation § 301.9100-3(b)(3) provides that a taxpayer will not be deemed 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, 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.

Taxpayer represents that, due to its consolidated losses, the making of this election will not result in any additional tax due on its consolidated returns for Taxable Years 1 and 2. As such, Taxpayer does not seek to alter a return position for which an accuracy-related penalty could be imposed under section 6662. In addition, Taxpayer represents that it did not chose not to file the election and that it is not using hindsight in requesting relief.

Treasury Regulation § 301.9100-3(c)(1) provides that an extension of time to make a regulatory election will be granted only when the interests of the government are not prejudiced by the granting of relief. The interests of the government are prejudiced if granting relief would result in a 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). Treas. Reg. § 301.9100-3(c)(1)(i).

Under Treas. Reg. § 301.9100-3(c)(1)(ii), the interests of the government also ordinarily are 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 under section 6501(a) before the taxpayer's receipt of a ruling granting relief.

Taxpayer represents that the interests of the government will not be prejudiced by the grant of this relief because the request will not result in the taxpayer having 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. In addition, the periods of limitation for Taxable Years 1 and 2 and the taxable years that would have been affected by the election had it been timely made remain open.

CONCLUSION

Based upon on the information submitted and representations made, we conclude that Taxpayer acted reasonably and in good faith, and granting relief will not prejudice the interests of the government. Therefore, the requirements of Treas. Reg. §§ 301.9100-1 and 301.9100-3 have been met.

Taxpayer is granted an extension of 60 days from the date of this ruling to make the consent dividend election by filing Schedules PH, Forms 972, and Forms 973 for Taxable Years 1 and 2.

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. In particular, no opinion is expressed as to whether Taxpayer properly calculated the amount of consent dividends and PHC income.

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.

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,

Bridget Tombul
Branch Chief, Branch 2
(Income Tax & Accounting)

cc: