

Internal Revenue Service

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Department of the Treasury

Washington, DC 20224

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Person To Contact:

, ID No.

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PLR-109643-21

Date:

October 12, 2021

LEGEND:

Taxpayer =

Common Owner =

Return Preparer =

Taxable Year at Issue =

Date1 =

Date2 =

Date3 =

\$a =

\$b =

\$c =

\$d =

\$e =

\$f =

\$g =

Dear :

This letter responds to your letter ruling request dated April 22, 2021, requesting an extension of time pursuant to sections 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations to make a late election of a consent dividend pursuant to section 565 of the Internal Revenue Code (Code) for the Taxable Year at Issue.

FACTS

Taxpayer is a domestic LLC, a calendar year taxpayer that uses the overall accrual method of accounting. Taxpayer was organized for the purpose of investing in real property, and established as a Real Estate Investment Trust (REIT) on Date1. Ownership of Taxpayer is split between the holders of preferred units, and common units; Common Owner holds all common unit of Taxpayer.

On Date2, Taxpayer's board of directors adopted a resolution (Date2 resolution) calling for Taxpayer to make a distribution to Common Owner in an amount equal to the greater of \$a or Taxpayer's previously undistributed taxable income for the Taxable Year at Issue (declared dividend amount). That resolution provided that a cash distribution of the declared dividend amount must be made on or before Date3, unless Common Owner elected a consent dividend in-lieu-of the cash distribution by providing Taxpayer with the requisite Form 972, Consent of Shareholder to Include Specific Amount in Gross Income, pursuant to section 565 and the associated regulations. Despite the Date2 resolution, however and due to an oversight, Taxpayer failed to make any actual distribution of the declared amount to Common Owner, and Common Owner failed to provide Taxpayer with a Form 972.

Taxpayer retained Return Preparer to prepare its Federal income tax return for the Taxable Year at Issue (return). Return Preparer reviewed Taxpayer's records and recognized that Common Owner had not provided Taxpayer with a Form 972, nor had Taxpayer prepared any associated Form 973, Corporation Claim for Deduction for Consent Dividends, with respect to the declared dividend amount. As such, Return Preparer construed the absence of those forms as an indication that Taxpayer actually distributed the declared dividend amount in cash to Common Owner consistent with the Date2 resolution, and prepared Taxpayer's return accordingly.

Taxpayer's return claimed a \$b deduction for dividends paid, as provided by sections 857 and 561 of the Code. This deduction reflected \$c in preferred dividends that Taxpayer paid to its preferred owners, and \$d in common dividends that it purportedly paid to Common Owner.

Of the purported dividend to Common Owner, only \$e reflected common dividend amounts actually paid. The remainder reflected the declared dividend amount related to the Date2 resolution. This amount, however, was neither paid to Common Owner, nor had Common Owner provided Taxpayer with the requisite documentation electing to treat such an amount as a consent dividend, and thus was reported in error (reporting error).

The facts underlying the reporting error notwithstanding, Common Owner's Form 1065, U.S. Return of Partnership Income for the year at issue (Common Owner's return) reported the receipt of ordinary dividend income from Taxpayer totaling \$f. Of that amount, \$e reflected the amount of common dividends actually paid to Common Owner;

corresponding with amounts reported on Taxpayer's return. The remaining \$g related to the declared dividend amount related to the Date2 resolution, and in this respect demonstrates Owner's intent to recognize that amount as a consent dividend under section 565.

Taxpayer again retained Return Preparer to prepare its Federal income tax return for the following year. In reviewing Taxpayer's records, Taxpayer and Return Preparer discovered the reporting error on Taxpayer's return for the Taxable Year at Issue. On April 22, 2021, Taxpayer filed this request for an extension of time to elect to make a consent dividend of \$g for the Taxable Year at Issue, consistent with the consent dividend reported on Common Owner's return.

LAW

Section 565(a) of the Code 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 the regulations, to treat as a dividend the amount specified in such consent, the amount so specified shall, except as provided in section 565(b), constitute a consent dividend for purposes of section 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 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 specified limitations, by filing a consent at the time and in the manner specified in section 1.565-1(b). See section 1.565-1(a), Income Tax Regs. As such, 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 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 section 1.565-1(b)(3) includes the extended due date of a return filed pursuant to an extension of the time to file.

Sections 301.9100-1 through 301.9100-3 of the Procedure and Administration Regulations provide the standards the Commissioner uses to determine whether to grant an extension of time to make a regulatory election. Section 301.9100-2 provides automatic extensions of time for making certain elections. Section 301.9100-3 provides extensions of time for making elections that do not meet the requirements of section 301.9100-2.

Section 301.9100-1(b) defines the term "regulatory election" as an election whose due date is prescribed by a regulation published in the Federal Register, or a revenue ruling, procedure, notice or announcement published in the Internal Revenue Bulletin.

Section 301.9100-1(c) provides that the Commissioner may grant a reasonable extension of time to make a regulatory election, or a statutory election (but no more than six months except in the case of a taxpayer who is abroad) under all subtitles of the Internal Revenue Code except subtitles E, G, H and I.

Section 301.9100-3(a) provides extensions of time to make a regulatory election under Code sections other than those for which section 301.9100-2 expressly permits automatic extensions. Requests for extensions of time for regulatory elections will be granted when the taxpayer provides evidence (including affidavits described in the regulations) to establish to the satisfaction of the Commissioner that the taxpayer acted reasonably and in good faith, and granting relief will not prejudice the interests of the Government.

Section 301.9100-3(b)(1) states that a taxpayer will be 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) failed to make the election because of intervening events beyond the taxpayer's control;
- (iii) failed to make the election because, after exercising due diligence, 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 tax professional failed to make, or advise the taxpayer to make the election.

Under section 301.9100-3(b)(3), a taxpayer will not be considered 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 (taking into account section 1.6664-2(c)(3)) 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 original deadline that make the election advantageous to a taxpayer, the Service will not ordinarily grant relief.

Section 301.9100-3(c)(1) provides that the Commissioner will grant a reasonable extension of time only when the interests of the Government will not be prejudiced by the granting of relief. Section 301.9100-3(c)(1)(i) provides, in part, that 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 (taking into account the time value of money). Section 301.9100-3(c)(1)(ii) provides, in part, 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 section 6501(a) before the taxpayer's receipt of a ruling granting relief under this section.

ANALYSIS

Taxpayer is a REIT and all of its common units are owned by Common Owner. Taxpayer represents that these common units constitute consent stock under section 565(f)(1). Taxpayer and Common Owner intended to elect to make a consent dividend for purposes of section 561 (relating to the deduction for dividends paid). Taxpayer claimed a corresponding deduction for dividends paid as provided by section 561.

Taxpayer, however, failed to perfect its election by failing to file Forms 972 and 973 with Taxpayer's return for the year at issue. It is with respect to that failure that Taxpayer requests an extension of time to amend its original filed return in order to perfect its election to make a consent dividend by including the required Forms 972 and 973, and thus to perfect its corresponding deduction for dividends paid.

Taxpayer's request pertains to a regulatory election as defined in section 301.9100-1(b) of the Procedure and Administration Regulations, as the due date for electing to make a consent dividend is prescribed by section 1.565-1(b) of the Income Tax Regulations and Rev. Rul. 78-296. Accordingly, the Commissioner has the authority under sections 301.9100-1 and 301.9100-3, to grant Taxpayer's request for an extension of time to file an election to make a consent dividend under section 565 for the year at issue.

The information submitted, and representations made by Taxpayer establish that Taxpayer acted reasonably and in good faith under section 301.9100-3(b)(1). Taxpayer requested relief before its failure to properly make the regulatory election was discovered by the Commissioner. Accordingly, Taxpayer will be considered to have acted reasonably and in good faith.

Moreover, Taxpayer should not be deemed to have acted unreasonably or in a manner lacking good faith. Taxpayer's representations indicate that none of the circumstances listed in section 301.9100-3(b)(3) apply.

Based on Taxpayer's representation of the facts, granting an extension of time to file the election will not prejudice the interests of the government under section 301.9100-3(c)(1). Taxpayer has represented that granting relief would not result in a lower tax liability in the aggregate for all taxable years affected by the election than would have resulted had Taxpayer timely made the election (taking into account the time value of money). Further, Taxpayer has represented that the period of limitations on assessment under section 6501(a) has not closed for the Taxable Year at Issue, or for any taxable years that would have been affected had Taxpayer timely made the election.

CONCLUSION

Based solely on the facts submitted and the representations made, we conclude that Taxpayer acted reasonably and in good faith, and that granting the request will not prejudice the interests of the government. Accordingly, the requirements of sections 301.9100-1 and 301.9100-3(b)(1) of the Procedure and Administration Regulations have been satisfied.

Taxpayer is granted an extension of time until 60 days following the date of this ruling to file an amended tax return that includes the Forms 972 and 973 that are necessary for electing to make a section 565 consent dividend for the Taxable Year at Issue.

The rulings contained in this letter are based upon information and representations submitted by Taxpayer and accompanied by a penalty of perjury statement executed by appropriate parties. 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.

Except as expressly provided herein, no opinion is expressed or implied concerning the Federal income tax consequences of any aspect of any transaction or item discussed or referenced in this ruling under any other provision of the Code. In particular, no opinion is expressed or implied as to whether Taxpayer otherwise qualifies for the deduction for dividends paid, or as a REIT under the Code.

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 ruling must be attached to Taxpayer's Federal income tax returns for the tax years affected. 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 representatives. We are also sending a copy of this letter to the appropriate operating division director. Enclosed is a copy of the letter ruling showing the deletions proposed to be made in the letter when it is disclosed under section 6110 of the Code.

Sincerely,

JAMIE J. KIM
Senior Technician Reviewer, Branch 3
Office of the Associate Chief Counsel
(Income Tax & Accounting)

Enclosure: Copy of the letter for section 6110 purposes

cc: