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Washington, DC 20224

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Person To Contact:

Telephone Number:

Refer Reply To:

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PLR-107738-04

Date:

July 02, 2004

In Re:

LEGEND

Taxpayer =

Dear :

This letter responds to your ruling request dated February 6, 2004, submitted on behalf of Taxpayer, requesting the following rulings:

1) Taxpayer is not required to treat a pool account as a "joint" account for purposes of the withholding provisions under sections 1441, 1442, 1443, 1445, 1446, and 3406 of the Internal Revenue Code (Code). Taxpayer may determine its withholding obligations separately for each pool participant. Consequently, Taxpayer may determine its sections 1441, 1442, 1443, 1445, 1446, and 3406 withholding requirements according to: (i) the amount of income paid to each pool participant; and (ii) the documentation (e.g., Form W-8BEN, etc.) provided by each pool participant. Further, Taxpayer need not obtain an intermediary tax form (Form W-8IMY) for a pool.

2) Taxpayer is not required to treat a pool account as a "joint" account for purposes of its Form 1042-S or Form 1099 reporting requirements under sections 1461, 6041, 6042, 6045, and 6049 of the Code. Taxpayer may determine such reporting obligations according to the amounts paid to, and withheld from (if any), each pool participant.

FACTS

Taxpayer is a bank that provides a variety of financial services, including investment management, trading, and global custody. As part of its global custody services, Taxpayer collects interest, dividends, and other income on behalf of U.S. and foreign investors.

Taxpayer is introducing a new “pooling” process for large institutional investors (pension plans, investment funds, etc.). Under this new process, Taxpayer will pool the assets of different funds or portfolios into a single account for purposes of custody and investment management.

The pool is not a legal entity. Participants in a pool do not buy or sell “units” of the pool, but rather they have a calculated “ownership ratio” that represents their percentage of ownership in each pool. The proportion of each stock position or ledger balance in the pool owned by the participating fund is shown at the participating fund level. The ownership ratio will change at every valuation point to reflect contributions/withdrawals to the pool and to reflect changes in asset values.

Pool participants do not have joint ownership of all the assets in the pool. Also, pool participants do not have survivorship rights. Taxpayer tracks the ownership of assets in the pool on a segregated basis for each pool participant. Taxpayer’s reporting of income and other information for the pool also is at the participant level (as well as the pool level).

Taxpayer also tracks the amount of income paid to each pool participant. To the extent that foreign participants in a pool are subject to different withholding rates, Taxpayer can apply the applicable rate to each participant’s income.

LAW AND ANALYSIS

Withholding Provisions

1. Withholding under Sections 1441, 1442, 1443, 1445, and 1446

Section 1441(a) provides the general rule that all payors must deduct and withhold a tax equal to 30 percent on payments of certain items of income to nonresident aliens to the extent that such items constitute gross income from sources within the United States. Section 1441(b) provides that these items of income include interest, dividends, rent, salaries, wages, premiums, annuities, compensations, remunerations and emoluments or other fixed or determinable annual or periodical gains, profits, and income.

Section 1442(a) provides that, in the case of foreign corporations subject to taxation under this subtitle, there shall be deducted and withheld at the source in the same manner and on the same items of income as provided in section 1441 a tax equal to 30 percent thereof.

Section 1443(a) provides that, in the case of income of a foreign organization subject to the tax imposed by section 511, this chapter shall apply to income includible under section 512 in computing its unrelated business taxable income, but only to the extent and subject to such conditions as may be provided under regulations prescribed by the Secretary.

Section 1445(a) provides that, except as otherwise provided in this section, in the case of any disposition of a United States real property interest (as defined in section 897(c)) by a foreign person, the transferee shall be required to deduct and withhold a tax equal to 10 percent of the amount realized on the disposition.

Section 1446(a) provides the general rule that if (1) a partnership has effectively connected taxable income for any taxable year, and (2) any portion of such income is allocable under section 704 to a foreign partner, such partnership shall pay a withholding tax under this section at such time and in such manner as the Secretary shall by regulations prescribe.

The withholding requirements under sections 1441, 1442, 1443, 1445, and 1446 include specific rules for payments to “joint owners” or “joint payees” where at least one of the joint owners or joint payees is a non-U.S. person.

Treas. Reg. § 1.1441-6(d) provides that in the case of a payment to joint owners, each owner must furnish a withholding certificate or, if applicable, documentary evidence or a certificate of residence. The applicable rate of withholding on a payment of income to joint owners shall be the highest applicable rate.

Treas. Reg. § 1.1441-1(b)(3)(vii) provides that if a withholding agent makes a payment to joint payees and cannot reliably associate a payment with valid documentation from all payees, the payment is presumed made to an unidentified U.S. person. However, if one of the joint payees provides a Form W-9 furnished in accordance with the procedures described in §§ 31.3406(d)-1 through 31.3406(d)-5 of this chapter, the payment shall be treated as made to that payee. See § 31.3406(h)-2 of this chapter for rules to determine the relevant payee if more than one Form W-9 is provided.

2. Withholding under section 3406

Section 3406(a)(1) provides that in the case of any reportable payment, if (A) the payee fails to furnish his TIN to the payor in the manner required, (B) the Secretary notifies the payor that the TIN furnished by the payee is incorrect, (C) there has been a notified payee underreporting described in subsection (c), or (D) there has been a payee certification failure described in subsection (d), then the payor shall deduct and withhold from such payment a tax equal to the product of the fourth lowest rate of tax applicable under section 1(c).

Treas. Reg. § 31.3406(h)-2(a)(3) provides that if the relevant payee listed on a jointly owned account or instrument provides a Form W-8 or documentary evidence described in § 1.1441-1(e)(1)(ii) regarding its foreign status, withholding under section 3406 applies unless every joint payee provides the statement regarding foreign status (under the provisions of chapters 3 or 61 of the Code and the regulations under those

provisions) or any one of the joint owners who has not established foreign status provides a taxpayer identification number to the payor in the manner required in § 31.3406(d)-1 through 31.3406(d)-5.

In the present situation, you represent that, the pool participants do not have joint ownership in all the assets in the pool, but rather have a percentage of ownership in each pool. Based on the information provided, Taxpayer's pool participants are not joint owners and/or joint payees. Thus, Taxpayer is not required to treat a pool account as a "joint account" for purposes of the withholding requirements under sections 1441, 1442, 1443, 1445, 1446, and 3406. Taxpayer may withhold according to: 1) the amount of income paid to each pool participant; and 2) the documentation provided by each pool participant.

Reporting Provisions

1. Reporting under section 1461

Section 1461 provides that every person required to deduct and withhold any tax under this chapter is hereby made liable for such tax and is hereby indemnified against the claims and demands of any person for the amount of any payments made in accordance with the provisions of this chapter.

Treas. Reg. § 1.1461-1(c)(4)(i)(A) provides that in the case of joint owners, a withholding agent may provide a single Form 1042-S made out to the owner whose status the U.S. withholding agent relied upon to determine the applicable rate of withholding. If, however, any one of the owners requests its own Form 1042-S, the withholding agent must furnish a Form 1042-S to the person who requests it.

2. Reporting under sections 6041, 6042, 6045, and 6049

Section 6041(a) of the Code provides that all persons engaged in a trade or business and making payments in the course of such trade or business to another person, of rent, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable gains, profits, and income of \$600 or more in any taxable year, shall file a return with the Secretary.

Section 6042(a)(1) provides that every person (A) who makes payments of dividends aggregating \$10 or more to any other person during any calendar year, or (B) who receives payments of dividends as a nominee and who makes payments aggregating \$10 or more during any calendar year to any other person with respect to the dividends so received, shall make a return according to the forms or regulations prescribed by the Secretary.

Section 6045(a) provides the general rule that every person doing business as a broker shall, when required by the Secretary, make a return, in accordance with such regulations as the Secretary may prescribe.

Section 6049(a) provides that every person (1) who makes payments of interest aggregating \$10 or more to any other person during any calendar year, or (2) who receives payments of interest as a nominee and who makes payments aggregating \$10 or more during any calendar year to any other person with respect to the interest so received, shall make a return according to the forms or regulations prescribed by the Secretary.

The reporting requirements under sections 6041, 6042, 6045, and 6409 include specific rules for payments to “foreign payees” and “joint owners.”

Treas. Reg. § 1.6041-4(a)(1) provides that returns of information are not required for payments that a payor can, prior to payment, associate with documentation upon which it may rely to treat as made to a foreign beneficial owner in accordance with § 1.1441-1(e)(1)(ii) or as made to a foreign payee in accordance with § 1.6049-5(d)(1) or presumed to be made to a foreign payee under § 1.6049-5(d)(2), (3), (4), or (5). However, such payments may be reportable under § 1.1461-1(b) and (c).

Treas. Reg. § 1.6041-4(b) provides that amounts paid to joint owners for which a certificate or documentation is required as a condition for being exempt from reporting under paragraph (a) of this section are presumed made to U.S. payees who are not exempt recipients if, prior to payment, the payor or middleman cannot reliably associate the payment either with a Form W-9 furnished by one of the joint owners in the manner required in § 31.3406(d)-1 through 31.3406(d)-5 of this chapter, or with documentation described in paragraph (a)(1) of this section furnished by each joint owner upon which the payor or middleman can rely to treat each joint owner as a foreign payee or foreign beneficial owner.

Treas. Reg. § 1.6042-3(b)(1) provides that the amounts described in paragraphs (b)(1)(i) through (vii) of this section are not dividends. Treas. Reg. § 1.6042-3(b)(1)(iii) provides that distributions or payments that a payor can, prior to payment, reliably associate with documentation upon which it may rely to treat as made to a foreign beneficial owner in accordance with § 1.1441-1(e)(1)(ii) or as made to a foreign payee in accordance with § 1.6049-5(d)(1) or presumed to be made to a foreign payee under § 1.6049-5(d)(2), (3), (4), or (5). However, such payments may be reportable under § 1.1461-1(b) and (c).

Treas. Reg. § 1.6042-3(b)(3) provides that amounts paid to joint owners for which a certificate or documentation is required as a condition for being exempt from reporting under this paragraph (b) are presumed made to U.S. payees who are not exempt recipients if, prior to payment, the payor or middleman cannot reliably associate the payment either with a Form W-9 furnished by one of the joint owners in the manner

required in § 31.3406(d)-1 through 31.3406(d)-5 of this chapter, or with documentation described in paragraph (b)(1)(iii) of this section furnished by each joint owner upon which it can rely to treat each joint owner as a foreign payee or foreign beneficial owner.

Treas. Reg. § 1.6045-1(g)(1) provides that no return of information is required to be made by a broker with respect to a customer who is considered to be an exempt foreign person under this paragraph (g)(1). A broker may treat a customer as an exempt foreign person under the circumstances described in paragraphs (g)(1)(i) through (iii) of this section.

Treas. Reg. § 1.6045-1(g)(1)(i) provides that with respect to a sale effected at an office of a broker either inside or outside the United States, the broker may treat the customer as an exempt foreign person if the broker can prior to the payment, associate the payment with documentation upon which it can rely in order to treat the customer as a foreign beneficial owner in accordance with § 1.1441-1(e)(1)(ii), or as made to a foreign payee in accordance with § 1.6049-5(d)(1) or presumed to be made to a foreign payee under § 1.6049-5(d)(2) or (3).

Treas. Reg. § 1.6045-1(g)(3)(i) provides that amounts paid to joint owners for which a certificate or documentation is required as a condition for being exempt from reporting under paragraph (g)(1)(i) or (2) of this section are presumed made to U.S. payees who are not exempt recipients if, prior to payment, the broker or barter exchange cannot reliably associate the payment either with a Form W-9 furnished by one of the joint owners in the manner required in § 31.3406(d)-1 through 31.3406(d)-5 of this chapter, or with documentation described in paragraph (g)(1)(i) of this section furnished by each joint owner upon which it can rely to treat each joint owner as a foreign payee or foreign beneficial owner.

Treas. Reg. § 1.6049-5(b)(12) provides that the term interest does not include payments that a payor can, prior to payment, reliably associate with documentation upon which it may rely to treat the payment as made to a foreign beneficial owner in accordance with § 1.1441-1(e)(1)(ii) or as made to a foreign payee in accordance with paragraph (d)(1) of this section or presumed to be made to a foreign payee under paragraph (d)(2) or (3) of this section. However, such payments may be reportable under § 1.1461-1(b) and (c).

Treas. Reg. § 1.6049-5(d)(2)(iii) provides that amounts paid to accounts held jointly for which a certificate or documentation is required as a condition for being exempt from reporting under paragraph (b) of this section are presumed made to U.S. payees who are not exempt recipients if, prior to payment, the payor cannot reliably associate the payment either with a Form W-9 furnished by one of the joint owners in the manner required in § 31.3406(d)-1 through 31.3406(d)-5 of this chapter, or with documentation described in paragraph (b)(12) of this section furnished by each joint owner upon which it can rely to treat each joint owner as a foreign payee or foreign beneficial owner.

As previously state, you represent that, the pool participants do not have joint ownership in all the assets in the pool, but rather have a percentage of ownership in each pool. Based on the information provided, Taxpayer's pool participants are not joint owners and/or joint payees. Therefore, Taxpayer is not required to treat a pool account as a "joint account" for purposes of the reporting requirements under sections 1461, 6041, 6042, 6045, and 6049. Taxpayer may report according to: 1) the amount of income paid to each pool participant; and 2) the amount withheld from each pool participant.

CONCLUSIONS

Based solely on the information provided and the representations made, we conclude as follows:

- 1) Taxpayer is not required to treat a pool account as a "joint" account for purposes of the withholding provisions under sections 1441, 1442, 1443, 1445, 1446, and 3406 of the Code. Taxpayer may determine its withholding obligations separately for each pool participant. Consequently, Taxpayer may determine its sections 1441, 1442, 1443, 1445, 1446, and 3406 withholding requirements according to: (i) the amount of income paid to each pool participant; and (ii) the documentation (e.g., Form W-8BEN, etc.) provided by each pool participant. Further, Taxpayer need not obtain an intermediary tax form (Form W-8IMY) for a pool.
- 2) Taxpayer is not required to treat a pool account as a "joint" account for purposes of its Form 1042-S or Form 1099 reporting requirements under sections 1461, 6041, 6042, 6045, and 6049 of the Code. Taxpayer may determine such reporting obligations according to the amounts paid to, and withheld from (if any), each pool participant.

This ruling is based on the facts presented and the applicable law in effect on the date of this letter. If there is a change in material fact or law (local or federal) before the transactions considered in this ruling take effect, the ruling will have no force or effect.

Except as specifically ruled herein, no opinion is expressed as to the federal tax treatment of any issue addressed in this ruling under other provisions of the Code and Regulations that may be applicable.

Pursuant to the power of attorney on file in this office, the original letter is being sent to you as the Taxpayer's representative.

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.

Sincerely,

Tiffany P. Smith+

Assistant to the Branch Chief, Administrative
Provisions & Judicial Practice, Branch 1
(Procedure & Administration)