

Internal Revenue Service

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Date:

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Legend

Date 1 –

Parent =

Sub A –

Sub B –

X =

Year A =

Year B =

Year C =

Year D =

W =

Q =

K =

L =

Dear :

This is in reply to the private letter ruling request of Date 1 requesting an extension of time, under §§ 301.9100-1 and -3 of the Procedure and Administration Regulations, for the Taxpayers, Parent, Sub A and Sub B, to make consent dividend elections pursuant to § 565 of the Internal Revenue Code.

Facts

Parent, Sub A and Sub B are accrual method taxpayers with a tax year ending on December 31. Sub A and Sub B are members of the same affiliated group as Parent, and Parent has elected to file a consolidated federal income tax return for tax years ending December 31, Year A and Year B. X, through its subsidiaries, owns a significant but non-controlling interest in Parent. Parent is involved in the business of manufacturing W. The business of W was adversely affected by Q, which caused company sales and profitability to decline.

Sub A is a wholly owned subsidiary of Parent and a substantial amount of Sub A's income is personal holding company income as defined by § 543(a). Sub B is also a wholly owned subsidiary of Parent and a substantial amount of Sub B's income is personal holding company income as defined by § 543(a).

Prior to Year A, neither Sub A nor Sub B were personal holding companies due to failure to meet the stock ownership requirement for personal holding companies as defined by § 542(a)(2). Changes in the X group structure impacted the attributed ownership of Parent, as defined by § 544 for taxable years ending December 31, Year A, so that beginning in that year Sub A and Sub B met the stock ownership requirements for personal holding companies as defined by § 542(a)(2). Parent, Sub A and Sub B failed to make the election described in § 565(a)(1) in Year A and in Year B.

Prior to Year C, Parent employed one tax professional at its K headquarters. The tax director was responsible for all U.S. tax compliance and for all U.S. GAAP reporting of taxes. A significant increase in U.S. GAAP documentation and reporting requirements became extremely burdensome on the tax department function, however, the tax director was precluded from hiring additional tax personnel due to cost-cutting measures implemented by Parent after Q. In December, Year B, Parent's tax director tendered his resignation, effective the first week of January, Year C. Parent's tax function was transferred to X's L office in January, Year C. During Year C Parent's headquarters was relocated from K to L, and the majority of Parent's staff, consisting primarily of accounting and financial professionals were replaced with newly hired personnel, since only four or five of the existing staff chose to transfer from K to L. In Year D, during preparation of Parent's consolidated income tax return for Year C by X's tax department, it was discovered that Sub A and Sub B were personal holding companies during Year A and Year B and, absent a consent dividend election, would be subject to tax on undistributed personal holding company income under § 541.

The staffing limitations, the unexpected transition of Parent's tax function from K to L, and the fact the neither Parent nor any of its subsidiaries had a history of personal holding company status contributed to the failure to timely make the consent dividend election for Year A and Year B.

The failure to timely file the election mentioned above was not discovered by the Service prior to receipt of the request for relief to make a late election.

Ruling Requested

The Taxpayers request that they be granted an extension of time under § 301.9100-1 and 301.9100-3 to file the election under § 565(a) to declare a consent dividend for the undistributed PHC income of Sub A and Sub B for the tax years ending December 31, Year A and December 31, Year B.

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 dividend for the taxable year. A consent dividend is a hypothetical 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 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 301.9100-3(a) of the Procedure and Administration regulations generally provides that requests for extensions of time for regulatory elections will be granted when the taxpayer provides evidence to establish 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) inadvertently 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, and the tax professional failed to make, or advise the taxpayer to make, the election.

Section 301.9100-3(b)(2) of the regulations provides that there is no reasonable reliance if the taxpayer knew or should have known that the professional was not competent to render advice on the regulatory election or was not aware of all relevant facts.

Under § 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 could be imposed under § 6662 at the time the taxpayer requests relief and the new position requires a regulatory election for which relief is requested;
- (ii) was fully informed 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) of the regulations 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). This section also provides that the interests of the government 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 on assessments under section 6501(a) before the taxpayer's receipt of a ruling granting relief under this section.

In the present case, the taxpayers have demonstrated that they acted reasonably and in good faith in that they requested relief before the failure to make the election was discovered by the Service.

Parent has represented that none of the circumstances described in § 301.9100-3(b)(3) are present in this case, so that the taxpayers are not deemed to have not acted reasonably and good faith in this case.

Finally, in the present case, granting the relief will not prejudice the interests of the government, as described in § 301.9100-3(c). Granting relief will not result in the taxpayers having a lower tax liability in the aggregate, for all taxable years affected by the election, than the taxpayers would have had if the election had been timely made (taking into account the time value of money). None of the taxable years in which the election should have been made or that would have been affected by the election had it been timely made are closed by the period of limitations on assessments under § 6501(a).

Accordingly, the consent of the Commissioner is hereby granted for an extension of the time to file the forms necessary to make the § 565 consent dividend election for the taxable year ending in Year A and Year B. This extension shall be for a period of 45 days from the date of this ruling. Please attach a copy of this ruling to the returns, schedules, and forms filed in connection with making this election under § 565 when such forms are filled.

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.

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.

A copy of this letter must be attached to any income tax return to which it is relevant. 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.

The rulings contained in this letter are based upon information and representations submitted by the taxpayers 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,

Christopher F. Kane
Chief, Branch 3
(Income Tax & Accounting)