

**Internal Revenue Service**

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Department of the Treasury

Washington, DC 20224

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Person To Contact:

, ID No.

Telephone Number:

Refer Reply To:

CC:ITA:B01

PLR-128320-20

Date:

June 11, 2021

In Re:

Taxpayer =

State =

Date1 =

Date2 =

Date3 =

Date4 =

Date5 =

A =

B =

C =

D =

E =

F =

G =

H =

Accountant1 =

Accountant2 =

Dear :

This letter responds to your letter, dated December 4, 2020 and supplemental correspondence, requesting an extension of time under §§ 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations for Taxpayer to make a late consent dividend election pursuant to § 565 of the Internal Revenue Code.

**FACTS**

Taxpayer represents the facts as follows:

Taxpayer, a corporation, is organized and incorporated in State. For the taxable year ending Date1, Taxpayer was owned A% each by D and E, and for the taxable year ending Date2, Taxpayer was owned B% each by D and E and C% by F. Taxpayer timely filed its income tax returns on Form 1120 for the taxable years ending Date1 and Date2.

Taxpayer hired Accountant1 to advise on all tax matters, prepare the corporate and individual income tax returns, and ensure its compliance with Federal tax filing obligations. Accordingly, Accountant1 prepared and filed Taxpayer's income tax returns for the taxable years ending Date1 and Date2 with assistance from G, the former CFO of Taxpayer. In the course of preparing the tax returns at issue, Accountant1 did not consider or consult with any member of Taxpayer about the use of a consent dividend under § 565 as an alternative means for reducing accumulated taxable income as defined under § 533 due to the fact that Taxpayer's income tax liability was already properly deducted by allowable business expenses. Taxpayer achieved the same tax liability result as the tax liability result that would have occurred if the consent dividend election was timely filed. Further, no member of Taxpayer, including G, had any knowledge regarding an option of a consent dividend and the related impact on the accumulated earnings tax and relied upon Accountant1, who failed to advise Taxpayer to make the consent dividend election.

In Date3, Taxpayer hired a new CFO, H. In Date4, H hired Accountant2 to assist in the preparation of Taxpayer's tax return for the taxable year ended Date5. In the course of preparing this tax return, Accountant2 reviewed the prior year Federal income tax returns of Taxpayer, and concluded that Taxpayer should have declared a consent dividend under § 565 along with filing Forms 972, Consent of Shareholder to Include Specific Amount in Gross Income and Forms 973, Corporation Claim for Deduction for Consent Dividends, on those prior year tax returns. Accordingly, after Accountant2 discussed this with H, H recommended to D and E that Taxpayer should request an extension of time to make a consent dividend election for the taxable years ending Date1 and Date2. Taxpayer represents that upon the granting of this request, Taxpayer will file the applicable amended Federal income tax returns for Taxpayer, including Forms 972, Consent of Shareholder to Include Specific Amount in Gross Income and Forms 973, Corporation Claim for Deduction for Consent Dividends for the taxable years ending Date1 and Date2.

## 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 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 § 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.

Sections 301.9100-1 through 301.9100-3 of the Procedure and Administration regulations provide the standards the Commissioner will use to determine whether to grant an extension of time to make an 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 § 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 has discretion to grant a reasonable extension of time under the rules set forth in §§ 301.9100-2 and 301.9100-3 to make certain regulatory elections.

Section 301.9100-3(a) provides extensions of time to make a regulatory election under Code sections other than those for which § 301.9100-2 expressly permits automatic extensions. Requests for relief under § 301.9100-3 will be granted when the taxpayer provides evidence to establish to the satisfaction of the Commissioner that the taxpayer acted reasonably and in good faith and that 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: (1) requests relief before the failure to make the regulatory election is discovered by the Service, (2) failed to make the election because of intervening events beyond the taxpayer's control, (3) failed to make the election because, after exercising due diligence, the taxpayer was unaware of the necessity for the election, (4) reasonably relied on the written advice of the Service, or (5) 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 § 301.9100-3(b)(3), a taxpayer will not be considered to have acted reasonably and in good faith if the taxpayer: (1) seeks to alter a return position for which an accuracy-related penalty has been or could be imposed under § 6662 at the time the taxpayer requests relief (taking into account § 1.6664-2(c)(3)) and the new position requires or permits a regulatory election for which relief is requested, (2) was informed in all material respects of the required election and related tax consequences, but chose not to file the election, or (3) 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.

Taxpayer has represented that it is not seeking to alter a return position for which an accuracy-related penalty has been or could be imposed under § 6662 at the time Taxpayer requests relief, and was not informed in all material respects of the required election, and its related tax consequences, but chose not to file the election. Furthermore, Taxpayer has represented that it is not using hindsight in requesting relief and that specific facts have not changed since the original deadline that made the election advantageous to Taxpayer.

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 § 6501(a) before the taxpayer's receipt of a ruling granting relief. Under these criteria, the interests of the government are not prejudiced in this case.

## CONCLUSION

Based solely on the facts and representations submitted, we conclude that Taxpayer acted reasonably and in good faith, and granting relief will not prejudice the interests of the government. Accordingly, the consent of the Commissioner is hereby granted for an extension of time to file the tax forms necessary to make the § 565 consent dividend election for the taxable years ending Date1 and Date2. This extension shall be for a period of 60 days from the date of this ruling.

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.

A copy of this ruling should be attached to Taxpayer's federal 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 provisions of the power of attorney currently on file with this office, a copy of this letter is being sent to your authorized representative. We are also sending a copy of this letter to the appropriate LB&I Official.

Sincerely,

Alexa T. Dubert

Alexa T. Dubert  
Assistant to the Branch Chief, Branch 1  
Associate Chief Counsel  
(Income Tax & Accounting)

cc: