

Internal Revenue Service

Number: **201852012**

Release Date: 12/28/2018

Index Number: 4942.03-02, 4942.03-05,
9100.00-00

Department of the Treasury

Washington, DC 20224

Third Party Communication: None

Date of Communication: Not Applicable

Person To Contact:

, ID No.

Telephone Number:

Refer Reply To:

CC:TEGE:EOEG:EO1

PLR-112447-18

Date:

October 02, 2018

Taxpayer:

Individuals:

Firm:

Year 1:

Year 2:

Year 3:

Year 4:

Year 5:

Year 5a:

Year 6:

Year 6a:

Program:

Date 1:

Date 2:

Date 3:

Dear :

This letter responds to a letter from Taxpayer's authorized representative dated April 4, 2018, as supplemented, submitted on behalf of Taxpayer, requesting an extension of time under § 301.9100-3 of the Procedure and Administration Regulations to elect under § 53.4942(a)-3(c)(2)(iv) of the Foundation and Similar Excise Tax Regulations to treat excess distribution carryovers from prior tax years, beginning in Year 1, as current distributions out of corpus for purposes of meeting the distribution requirements of § 170(b)(1)(F)(ii) for Year 6. Taxpayer represents the facts as follows.

FACTS

Taxpayer is an entity recognized as exempt under § 501(a) as an organization described in § 501(c)(3) and classified as a private foundation under § 509(a). It provides grants to other § 501(c)(3) organizations. Individuals, as directors of, and substantial contributors to, the Taxpayer, are disqualified persons under § 4946.

For Taxpayer's Year 6, Taxpayer made qualifying distributions in an amount less than the contributions it received that year, all of which were from Individuals. For each of its previous five tax years (Years 1-5), Taxpayer made qualifying distributions, as defined by § 4942(g), in excess of distributable amounts, as defined by § 4942(d), which it carried forward.

Taxpayer engaged the accounting services of Firm to prepare its Year 6 Form 990-PF. It had reason to believe that Firm was competent to render these services and to advise it on any available elections, and Taxpayer provided Firm with all of the relevant facts. Taxpayer had sufficient excess qualifying distributions from Years 1-5 and was eligible to elect on its Year 6 Form 990-PF to treat its carryover excess qualifying distributions as current distributions out of corpus under § 53.4942(a)-3(c)(2)(iv). However, Firm did not inform Taxpayer of the availability of the election under § 53.4942(a)-3(c)(2)(iv) to apply its excess qualifying distribution carryovers to meet the distribution requirements of § 170(b)(1)(F)(ii), even though Taxpayer satisfied the requirements for claiming conduit foundation status under § 170(b)(1)(F)(ii) and for making the election under § 53.4942(a)-3(c)(2)(iv). As a consequence Taxpayer did not make this election for Year 6.

Individuals also engaged Firm to prepare their federal income tax returns for Years 5a and 6a. Individuals contributed appreciated property to Taxpayer in their Years 5a and 6a, for which they claimed charitable contribution deductions subject to the 20-percent limit of § 170(b)(1)(D). Individuals had assumed that Taxpayer was a private foundation not described in § 170(b)(1)(F) for this period. In preparing these returns, Firm relied on

Program, a tax compliance and return preparation software suite from a well-respected provider of such products.

Individuals' tax returns for Years 5a and 6a were audited by the IRS. At this time, Firm conducted a review of Taxpayer's Year 6 tax return, becoming aware of the significance to Individuals of its failure to recommend that Taxpayer make the § 53.4942(a)-3(c)(2)(iv) election, which would have allowed Individuals' charitable contribution deductions subject to the 50-percent of § 170(b)(1)(F)(ii) rather than the 20-percent limit of § 170(b)(1)(D). Taxpayer became aware of the fact and significance of this failure only when Firm so notified Taxpayer on Date 2.

Taxpayer submitted sworn affidavits from its officer and Firm that Firm did not communicate the availability of, and failed to make the election under, § 53.4942(a)-3(c)(2)(iv) to apply distribution carryovers to meet the conduit foundation requirement within the meaning of § 170(b)(1)(F)(ii) to the Year 6 Form 990-PF. Taxpayer represents that it did not use, nor does it intend to use, any of the excess qualifying distributions for any other purpose. Taxpayer represents that it is not seeking to alter a return position with regard to the election for which an accuracy-related penalty has been or could be imposed under § 6662(a).

LAW & GUIDANCE

Section 170(b)(1)(F)(ii) provides that contributions by an individual to a private foundation that, within three months and fifteen days of the end of the foundation's tax year, makes qualifying distributions that are treated as distributions out of corpus in an amount equal to 100 percent of those contributions, are deductible at 50 percent of the taxpayer's contribution base for the tax year.

With respect to the income of a private foundation for any tax year that has not been distributed before the first day of the second (or any succeeding) tax year following that tax year (if the first day falls within the tax period), § 4942(a) imposes a tax on the undistributed income equal to 30 percent of the amount of income remaining undistributed at the beginning of the second (or succeeding) tax year.

Section 4942(d) defines a private foundation's "distributable amount" for any tax year as (1) the sum of the minimum investment return plus the amounts described in § 4942(f)(2)(C), reduced by (2) the sum of the taxes imposed on the private foundation for the tax year under subtitle A and § 4940.

Section 4942(h) provides, in general, that qualifying distributions for a tax year are treated as made (A) first out of the undistributed income of the immediately preceding tax year (if the private foundation was subject to tax imposed by this section for the preceding year) to the extent thereof, (B) second out of undistributed income for the tax year to the extent thereof, and (C) then out of corpus.

Section 53.4942(a)-3(c)(2)(iv) provides that, in order to satisfy distribution requirements of § 170(b)(1)(E)(ii), a donee organization may elect to treat as a current distribution out of corpus any amount distributed in a prior tax year which was treated as a distribution out of corpus under § 53.4942(a)-3(d)(1)(iii), provided that (a) the amount has not been used in a prior year for any other purpose, such as a carryover under § 53.4942(a)-3(e) or a redistribution under § 53.4942(a)-3(c), (b) the corpus distribution occurred within the preceding 5 years, and (c) the amount is not later used for any other purpose. The election is made by attaching a statement to the return that the foundation is required to file under § 6033 for the tax year to which the election is to apply. The statement must contain a declaration by an appropriate foundation manager (within the meaning of § 4946(b)(1)) that the foundation is making an election under § 53.4942(a)-3(c) and that the distribution was treated under § 53.4942(a)-3(d)(1)(iii) as a distribution out of corpus in a designated prior tax year (or years). This election permits a taxpayer to satisfy the distribution requirements of § 170(b)(1)(F)(ii).

An extension of time to elect under § 53.4942(a)-3(c)(2)(iv) may be available pursuant to the relief provisions of §§ 301.9100-1 through -3.

Pursuant to § 301.9100-1(c), the Commissioner may grant a reasonable extension of time under the rules of §§ 301.9100-2 and -3 for making certain regulatory elections. A "regulatory election" is defined by § 301.9100-1(b) as an election the due date for which is prescribed by a regulation published in the Federal Register, or by a revenue ruling, revenue procedure, notice, or announcement published in the Internal Revenue Bulletin.

Sections 301.9100-1 through -3 provide the standards by which the Commissioner determines 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 301.9100-3(a) provides that requests for extensions of time for regulatory elections may be granted when the taxpayer provides evidence satisfactory to the Commissioner (including the affidavits described in § 301.9100-3(e)) that it acted reasonably and in good faith, and that the grant of relief will not prejudice the interests of the Government.

Except as provided in § 301.9100-3(b)(3), a taxpayer is deemed under § 301.9100-3(b)(1) to have acted reasonably and in good faith if it (i) requests relief under § 301.9100-3 before the IRS discovers the failure to make the regulatory election; (ii) 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 or issue), the taxpayer was unaware of the necessity for the election; (iv) reasonably relied on the

written advice of the IRS; 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.

For purposes of § 301.9100-3(b), § 301.9100-3(b)(2) provides that a taxpayer will not be considered to have reasonably relied on a qualified tax professional if the taxpayer knew or should have known that the professional was not (i) competent to render advice on the regulatory election; or (ii) aware of all relevant facts.

A taxpayer is deemed under § 301.9100-3(b)(3) not to have acted reasonably and in good faith if it (i) 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 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 election due date that make the election advantageous to a taxpayer, the IRS ordinarily will not grant relief, unless the taxpayer provides strong proof that its decision to seek relief did not involve hindsight.

Section 301.9100-3(c)(1) provides that the Commissioner will grant a reasonable extension of time to make a regulatory election only when the interests of the Government will not be prejudiced by granting relief.

Under § 301.9100-3(c)(1)(i), 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 tax years affected by the election than the taxpayer would have had if the election had been timely made. If the tax consequences of more than one taxpayer are affected by the election, the Government's interests are prejudiced if extending the time for making the election may result in the affected taxpayers, in the aggregate, having a lower tax liability than if the election had been timely made.

Under § 301.9100-3(c)(1)(ii), the interests of the Government ordinarily are prejudiced if the tax year in which the regulatory election should have been made or any tax 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 this section.

According to § 301.9100-3(d)(2), as a condition for relief, the IRS may require the taxpayer to consent under § 6501(c)(4) to an extension of the period of limitations on assessment for the tax year in which the regulatory election should have been made and for any tax years that would have been affected by the election had it been made timely.

A taxpayer seeking relief under § 301.9100-3 is required by § 301.9100-3(e) to provide evidence that satisfies the requirements of § 301.9100-3(b) [reasonableness and good faith] and (c) [prejudice to government interests], as well as certain additional information.

As required by § 301.9100-3(e)(2), a taxpayer seeking relief under § 301.9100-3 must submit a detailed affidavit describing the events that led to the failure to make a valid regulatory election and to the discovery of the failure. If the taxpayer relied on a qualified tax professional for advice, the affidavit must describe the engagement and responsibilities of the professional, as well as the extent to which the taxpayer relied on the professional.

As required by § 301.9100-3(e)(3), a taxpayer seeking relief under § 301.9100-3 must submit detailed affidavits from any individuals knowing about the events leading to the failure to make a valid regulatory election and to the discovery of that failure. These individuals must include the taxpayer's return preparer, any individual (including an employee of the taxpayer) who made a substantial contribution to the preparation of the return, and any accountant or attorney, knowledgeable in tax matters, who advised the taxpayer regarding the election. The affidavit must describe the engagement and responsibilities of the individual, as well as the advice that the individual provided to the taxpayer.

As required by § 301.9100-3(e)(4), in addition to the affidavits specified above, a taxpayer seeking relief under § 301.9100-3 must –

(i) state whether the taxpayer's return for the tax year in which the regulatory election should have been made or any tax years that would have been affected by the election had it been timely made is being examined by a district director, or is being considered by an appeals office or a federal court. The taxpayer must notify the IRS office considering the request for relief if the IRS starts an examination of any such return while the taxpayer's request for relief is pending;

(ii) state when the applicable return, form, or statement used to make the election was required to be filed and when it was actually filed;

(iii) submit a copy of any documents that refer to the election;

(iv) if requested, submit a copy of the taxpayer's return for any tax year for which the taxpayer requests an extension of time to make the election and any return affected by the election; and

(v) if applicable, submit a copy of the returns of other taxpayers affected by the election.

ANALYSIS

Taxpayer is an entity recognized as exempt under § 501(a) as an organization described in § 501(c)(3) and classified as a private foundation under § 509(a). As a private foundation, Taxpayer must distribute all of its distributable income for any tax year by the close of the following tax year. See § 4942(a) and (d). Taxpayer represents that, for the tax year in question, in reliance upon a qualified tax professional, it failed to make a proper election under § 53.4942(a)-3(c)(2)(iv) claiming conduit foundation status under § 170(b)(1)(F)(ii), even though it satisfied the requirements for this election.

Consequently, Taxpayer is requesting an extension of time under § 301.9100-3 to elect under § 53.4942(a)-3(c)(2)(iv) to treat excess distribution carryovers from prior tax years, beginning in Year 1, as current distributions out of corpus for purposes of meeting the distribution requirements of § 170(b)(1)(F)(ii) for Year 6.

The IRS may grant an extension of time for making a regulatory election if the taxpayer establishes by sufficient evidence, including detailed affidavits, that it acted reasonably and in good faith in failing to properly elect, and that relief would not prejudice the interests of the government.

Based on representations made and documents submitted, Taxpayer is not seeking to alter a return position, as reported on its timely-filed Year 6 Form 990-PF, for which an accuracy-related penalty has been or could be imposed under § 6662(a). Taxpayer did not willfully fail to file the election under § 53.4942(a)-3(c)(2)(iv) after having been informed in all material respects of the election and its tax consequences. Nor is the Taxpayer using hindsight in requesting relief; no specific facts have changed since the election due date that would make the election more advantageous to Taxpayer now than if it had elected on its timely-filed Form 990-PF. Therefore, Taxpayer is not deemed by § 301.9100-3(b)(3) to have failed to act reasonably and in good faith in failing to make the desired regulatory election.

Based on documentation provided, including affidavits, Taxpayer relied on Firm, a qualified tax professional, to complete and file its Form 990-PF for Year 6. Taxpayer had reason to believe that Firm was competent to advise it on all aspects of its return position, including the election under § 53.4942(a)-3(c)(2)(iv), and it provided Firm with all relevant facts. Taxpayer's reliance on Firm under these circumstances was reasonable. Therefore, Taxpayer is deemed under § 301.9100-3(b)(1)(v) and (2) to have acted reasonably and in good faith in its failure to make the desired regulatory election.

Based on representations made and documents provided, if Taxpayer had made the election under § 53.4942(a)-3(c)(2)(iv) in its timely-filed Year 6 Form 990-PF, its tax liability would have remained the same. A grant of relief will allow Individuals to file amended Forms 1040 for their Years 5a and 6a likely showing lower tax liabilities.

However, any adjusted tax liabilities for these years will not be lower than they would have been had Taxpayer made the election timely. In addition, on Date 3, Taxpayer filed Form 872, consenting under 6501(c)(4) to extend the period of limitations on assessment for Year 6. Therefore, pursuant to § 301.9100-3(c)(1), a grant of relief will not prejudice the interests of the government.

RULING

Based solely on the facts represented by Taxpayer, we conclude that the requirements of § 301.9100-3(b), (c), and (e), both substantive and procedural, have been satisfied. Consequently, Taxpayer is granted an extension of 60 days after the date of this letter to elect under § 53.4942(a)-3(c)(2)(iv) to treat excess distribution carryovers from prior years, beginning in Year 1, as current distributions out of corpus for purposes of meeting the distribution requirements of § 170(b)(1)(F)(ii) for Year 6. The election is to be made by filing an amended Form 990-PF for Year 6 and attaching a statement making the election.

A copy of this letter must be attached to the amended return. If Taxpayer files electronically, it must include the date and control number of this letter ruling.

Except as explicitly provided, we express no opinion concerning the tax consequences of any transaction or item discussed or referred to in this letter.

This ruling is directed only to the taxpayer that requested it. Section 6110(k)(3) of the Code provides that it may not be used or cited by others as precedent.

Under a power of attorney on file with this office, we are sending a copy of this letter to your authorized representative.

Sincerely,

Mary J. Salins
Branch Chief
Exempt Organizations Branch 1
Office of Associate Chief Counsel
(Tax Exempt & Government Entities)