

Internal Revenue Service

Department of the Treasury
Washington, DC 20224

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Person To Contact: _____, ID No. _____

Telephone Number: _____

Refer Reply To:
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PLR-138467-08

Date:
April 30, 2009

In Re: Section 9100 Request

Taxpayer =
CFC =
Corporation X =
Tax Year A =
Day C =
Year B =
Firm =

Dear _____ :

This replies to your August 15, 2008 letter (as supplemented by information provided on January 23rd, March 31st, and April 2nd of 2009) requesting an extension of time under Treas. Reg. § 301.9100-3 to file a Treas. Reg. § 1.954-2(g)(3) foreign currency gain or loss election on behalf of a CFC for Tax Year A (the “Regulatory Election”).

FACTS

Taxpayer, a U.S. corporation, is the ultimate parent of a large group of domestic and foreign corporations. In Tax Year A, Taxpayer formed CFC, a controlled foreign corporation for U.S. tax purposes under § 957 of the Internal Revenue Code (I.R.C.).

Taxpayer represents that due to a corporate restructuring, which it began in Year A, it inadvertently failed to make the Regulatory Election. Taxpayer explains that the corporate restructuring split its tax department into two locations and caused it to lose key staff, including its international tax manager. As part of the restructuring, Taxpayer completely disposed of Corporation X and its affiliates (which included CFC) as of Day C of Year B. As part of an audit of the Year B financial statements of Corporation X,

Firm discovered that Taxpayer had failed to make the Regulatory Election for CFC in Tax Year A.

Taxpayer asserts the following reasons show it acted reasonably and in good faith under Treas. Reg. § 301.9100-3, and should, therefore, be granted an extension of time to file the Treas. Reg. § 1.954-2(g)(3) election on behalf of CFC for Tax Year A:

- (i) It requested relief before its failure to make the election was discovered by the Service;
- (ii) It is not seeking to alter a return position for which an accuracy-related penalty has been or could be imposed under I.R.C. § 6662 (no alteration to the returns are necessary);
- (iii) It did not affirmatively choose not to file the Regulatory Election after having been informed in all material respects of the required election and related tax consequences; and
- (iv) It has not used hindsight in requesting relief (no facts have changed since the due date for making the election that make the election more advantageous to Taxpayer).

Taxpayer further asserts that granting the extension will not prejudice the interests of the Government because it will not result in Taxpayer, an affiliate, former affiliate, or the consolidated group as a whole, having a lower tax liability in the aggregate for all taxable years affected by the election than they would have had if the election had been timely made (taking into account the time value of money). In addition, Taxpayer represents that 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 not closed by the period of limitations on assessment under I.R.C. § 6501(a). Finally, Taxpayer represents it has satisfied the procedural requirements of Treas. Reg. §301.9100-3(e).

LAW

Treas. Reg. § 1.954-2(g)(3)(i) provides that a controlled foreign corporation may elect, for taxable years beginning on or after November 6, 1995, to exclude certain foreign currency gain or loss from foreign personal holding company income and, instead, include such foreign currency gain or loss in the category (or categories) of subpart F income (described in I.R.C. § 952(a), or, in the case of foreign base company income, described in Treas. Reg. § 1.954-1(c)(1)(iii)(A)(1) or (2)) to which such gain or loss relates.

Treas. Reg. § 1.954-2(g)(3)(ii) provides that the controlling United States shareholders, as defined in Treas. Reg. § 1.964-1(c)(5), make the election on behalf of the controlled foreign corporation by filing a statement with their original income tax returns for the taxable year of such United States shareholders ending with or within the taxable year of the controlled foreign corporation for which the election is made, clearly indicating that such election has been made. An election made pursuant to Treas. Reg. § 1.954-2(g)(3) is effective for the taxable year of the controlled foreign corporation for which it is made and all subsequent taxable years of such corporation unless revoked by or with the consent of the Commissioner. See Treas. Reg. § 1.954-2(g)(3)(iii).

Treas. Reg. § 301.9100-1(b) defines a regulatory election as an election whose due date is prescribed by a regulation, revenue ruling, revenue procedure, notice, or announcement.

Treas. Reg. § 301.9100-3 sets forth the conditions that must be satisfied to obtain an extension of time to make a non-automatic, regulatory election; that is a regulatory election that is not listed in Treas. Reg. § 301.9100-2(a)(2).

Treas. Reg. § 301.9100-1(c) provides that the Commissioner has discretion to grant a taxpayer a reasonable extension of time under the rules set forth in Treas. Reg. § 301.9100-3 to make a regulatory election under all subtitles of the Internal Revenue Code except subtitles E, G, H, and I.

Treas. Reg. § 301.9100-3(a) provides that requests for such relief will be granted when the taxpayer provides evidence (including affidavits described in § 301.9100-3(e)) to establish to the satisfaction of the Commissioner that the taxpayer acted reasonably and in good faith, and the grant of relief will not prejudice the interests of the Government.

Treas. Reg. § 301.9100-3(b)(1) provides that, except as provided in Treas. Reg. §§ 301.9100-3(b)(3)(i) through (iii), a taxpayer is deemed to have acted reasonably and in good faith if the taxpayer requests relief under this section before the failure to make the regulatory election is discovered by the Internal Revenue Service.

Treas. Reg. § 301.9100-3(b)(3) provides that a taxpayer is deemed to have not 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 I.R.C. § 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. In this regard, if specific facts have changed since the due date for making the election that make the election advantageous to a taxpayer, the Internal Revenue Service will not ordinarily grant relief unless the taxpayer provides strong proof that the taxpayer's decision to seek relief did not involve hindsight.

Treas. Reg. § 301.9100-3(c)(i) provides that 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 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). In addition, Treas. Reg. § 301.9100-3(c)(i) states that 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.

Treas. Reg. § 301.9100-3(c)(1)(ii) provides 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 assessments under I.R.C. § 6501(a) before the taxpayer's receipt of a ruling granting relief.

ANALYSIS

In this case, Treas. Reg. § 1.954-2(g)(3) prescribes the time for making the election; therefore, it is a regulatory election pursuant to Treas. Reg. § 301.9100-1(b). It is not, however, listed as an automatic election in Treas. Reg. § 301.9100-2(a)(2). As a non-automatic, regulatory election, the Commissioner has discretionary authority under Treas. Reg. § 301.9100-3 to grant Taxpayer a reasonable extension of time to make the election, provided Taxpayer satisfies the standards set forth in Treas. Reg. § 301.9100-3. Based upon the facts and representations of Taxpayer and the accompanying affidavits, we conclude that Taxpayer satisfies the requirements set forth in Treas. Reg. § 301.9100-3.

CONCLUSION

Taxpayer is granted an extension of time until ninety days from the date of this ruling letter to file the a Treas. Reg. § 1.954-2(g)(3) election on behalf of CFC for Tax Year A.

No ruling has been requested, and none is expressed or implied, regarding the application of any other section of the Code or regulations to the facts presented. As provided in Treas. Reg. § 301.9100-1(a), the granting of an extension of time is not a determination that Taxpayer is otherwise eligible to file the election statement.

The extension of time granted in this letter is a letter ruling pursuant to Treas. Reg. § 301.9100-3(e)(5). This ruling is based upon the information and representations submitted by Taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. This office has not verified any of the material submitted in support of the ruling request; it is subject to verification upon examination.

This ruling is directed only to the taxpayer who requested it. I.R.C. § 6110(k)(3) provides that it may not be used or cited as precedent. A copy of this ruling letter should be associated with the election statement.

In accordance with a power of attorney on file in this office, a copy of this ruling letter is being sent to you and your authorized representative.

Sincerely,

Jeffrey L. Dorfman
Chief, Branch 5
Associate Chief Counsel
(International)