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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:INTL:B02

PLR-119171-09

Date:

October 07, 2009

TYs:

Legend

Trust 1 =

Corporation 1 =

FC1 =

State A =

State B =

Advisor A =

Individual 1 =

Accounting Firm X =

Date 1 =

Date 2 =

Date 3 =

Dear :

This is in response to a letter received by our office on April 7, 2009, submitted on behalf of Trust 1 by Trust 1's authorized representative, requesting extensions of time under §§ 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations to make a mark to market election under Section 1296¹ and an election under Section 855(a) with respect to each taxable year in which any income is recognized as a result of the mark to market election.

The rulings contained in this letter are based upon information and representations

¹ Unless otherwise indicated, all Section references are to the Internal Revenue Code in effect as of the date of this ruling, or to Treasury regulations promulgated thereunder.

submitted by the taxpayer 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.

FACTS

Trust 1 is a State A Trust that is a non-diversified series of Corporation 1. Corporation 1 is currently, and for all times during the years at issue has been, organized as a State B corporation and registered as an open-end management investment company under the Investment Company Act of 1940, as amended. Trust 1 is taxed as a regulated investment company ("RIC") under Subchapter M of the Internal Revenue Code.

Advisor A is currently, and for all times during the years at issue has been, the investment advisor of Trust A. As investment advisor and provider of administrative services, Advisor A is responsible for, among other things, assisting in the preparation of Trust 1's filings required to maintain Trust 1's qualifications and to satisfy applicable federal and state tax requirements. Accordingly, Trust 1 relied upon Advisor A to identify the holdings of Trust 1 that qualify as PFICs. Accounting Firm X served as the tax return preparer of the federal and state income and excise tax returns of certain RICs that Advisor A manages, including the returns of Trust 1. Accounting Firm X is responsible for preparing the Section 1296 PFIC mark to market calculations for the foreign investment companies held by Trust 1 that are identified by Advisor A as PFICs.

At the time Trust 1 filed its Form 1120-RIC for its taxable years ending on Date 1 and Date 2, Advisor A had not identified FC1 as a PFIC. On or about Date 3, Advisor A determined that FC1 was a PFIC during its ongoing due diligence with respect to PFIC identification. Advisor A immediately notified Accounting Firm X that a mark to market election under Section 1296 was not made for FC1 in accordance with Corporation 1's policy of making a mark to market election for all identified PFICs held by its funds. Upon discovering its inadvertent failure to make the 1296 elections, Trust 1 sought the relief requested in this ruling.

For the years at issue, Trust 1 relied on Advisor A and Accounting Firm X for tax advice. Advisor A failed to identify FC1 as a PFIC and failed to advise Trust 1 of the possibility of making, or the consequences of failing to make, a QEF election with respect to FC1. Advisor A also failed to advise Trust 1 of the consequences of making or failing to make a mark to market election under Section 1296 with respect to FC1.

Trust 1 paid dividends during the taxable years ending on Date 1 and Date 2, and made an election under Section 855 for both taxable years with respect to such

dividends. The purpose for the dividends and corresponding Section 855 elections was to eliminate Trust 1's investment company taxable income and net capital gain for each taxable year, as well as eliminate any liability for the excise tax required by Section 4982 with respect to investment company taxable income after the close of each taxable year.

However, because Trust 1 was not aware that it may have had additional undistributed income due to a potential mark to market election, Trust 1 did not make the election under Section 855 with respect to the additional income.

Trust 1 has submitted an affidavit from Individual 1, who serves as Trust 1's Treasurer and CFO and A's managing director, in support of this ruling request.

Individual 1, on behalf of Trust 1 and A, has made the following additional representations:

1. Trust 1 is not aware of any knowledge on the part of the Service of Trust 1's failure to make the mark to market elections discussed herein.
2. Granting the relief will not result in Trust 1 having a lower tax liability in the aggregate for all years to which the regulatory election applies than Trust 1 would have had if the election had been made timely (taking into account the time value of money).
3. Trust 1 is not seeking to alter a return position for which an accuracy-related penalty has been or could have been imposed under Section 6662 of the Code.
4. If Trust 1 had been informed of FC1's status as a PFIC, Trust 1 would have made a timely mark to market election under Section 1296 for the taxable years at issue and would have paid additional dividends and included the resultant increased income for those years in the amount for which Section 855 elections were made.
5. The proposed elections will not affect any closed tax year.
6. Trust 1 is not using hindsight in requesting relief under Section 301.9100-3 and no specific facts have changed since the due date for making the elections which would make the elections advantageous to Trust 1.

LAW

Section 855(a) provides, in part, that if a RIC declares a dividend prior to the time prescribed by law for the filing of its return for a tax year (including the period of any extension of time granted for filing such return), and distributes the amount of the dividend to shareholders in the 12-month period following the close of such tax year and not later than the date of the first regular dividend payment made after the declaration, the amount so declared and distributed shall, to the extent the RIC elects in such return in accordance with regulations prescribed by the Secretary, be

considered as having been paid during such taxable year, except as provided otherwise by Section 855.

Treas. Reg. § 1.855-1(b)(1) provides that a Section 855(a) election must be made in the return filed by the RIC for the taxable year. The election shall be made by the taxpayer by treating the dividend (or portion thereof) to which such election applies as a dividend paid during the taxable year in computing its investment company taxable income, or if the dividend (or portion thereof) to which such election applies is to be designated by the company as a capital gain dividend, in computing the amount of capital gain dividends paid during such taxable year.

Section 1296(a) provides that, in the case of marketable stock in a passive foreign investment company that is owned by a United States person at the close of any taxable year, the person may elect to include in gross income the excess of the fair market value of the stock over its adjusted basis.

Treas. Reg. § 1.1296-1(h) provides that an election under Section 1296 for a taxable year must be made on or before the due date (including extensions) of the person's U.S. income tax return for that year.

Treas. Reg. § 301.9100-1(c) provides that the Commissioner has the 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 Code, except subtitles E, G, H, and I.

Treas. Reg. § 301.9100-1(b) provides that an election includes an application for relief in respect of tax, and 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(a) provides that requests for relief will be granted when the taxpayer provides the evidence (including affidavits described in Treas. Reg. § 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 a taxpayer is deemed to have acted responsibly and in good faith if the taxpayer

- (i) requests relief before the failure to make the regulatory election is discovered by the IRS;
- (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, 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, and the tax professional failed to make, or advise the taxpayer to make, the election.

Treas. Reg. § 301.9100-3(b)(3) provides that a taxpayer will not be deemed to have 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 Section 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 due date for making the election that make the election advantageous to a taxpayer, the IRS will not ordinarily grant relief.

Treas. Reg. § 301.9100-3(c)(1) provides that the granting of relief may prejudice the interests of the Government if

- (i) 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); or
- (ii) the taxpayer 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 Section 6501(a) before the taxpayer's receipt of a ruling granting relief under this section.

CONCLUSION

Based on the facts and representations submitted, we conclude that the requirements are satisfied for granting a reasonable extension of time to make the election under Section 1296 for Trust 1. Accordingly, an extension of time to make the election under Section 1296 is granted with respect to Trust 1's federal income tax return for taxable years ending Date 1 and Date 2. Further, the requirements are satisfied for granting a reasonable extension of time to make the election under Section 855(a) on Trust 1's federal income tax returns for the taxable years ending Date 1 and Date 2.

This ruling is limited to the timeliness of filing elections under Sections 855(a) and 1296. Except as specifically ruled upon herein, we express no opinion concerning

any federal excise or income tax consequences relating to the facts herein under any other section of the Code. For example, we express no opinion as to whether Trust 1 has, in fact, satisfied all of the requirements of Sections 855 and 1296 and the regulations thereunder. We also express no opinion as to whether Trust 1 qualifies as a RIC under subchapter M, part I, of Chapter 1 of the Code.

Further, no opinion is expressed as to whether Trust 1's tax liability is not lower in the aggregate for the year to which the regulatory election applies than Trust 1's liability would have been if the election had been timely made (taking into account the time value of money). Upon audit of the federal income tax return involved, the district director's office will determine Trust 1's tax liability for the years involved. If the district director's office determines that Trust 1's tax liability is lower, that office will determine the federal income tax effect.

This ruling is directed only to the taxpayer who requested 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 taxpayer's first and second representatives.

Sincerely,

Ethan A. Atticks
Senior Technical Reviewer, Branch 2
(International)

CC: