

Internal Revenue Service

Department of the Treasury
Washington, DC 20224

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Person To Contact:

, ID No.

Telephone Number:

Refer Reply To:

CC:FIP:B03 – PLR-116131-09

Date:

November 12, 2009

LEGEND:

Taxpayer =

Accounting Firm =

Advisor =

Bank =

State X =

Calendar Year =

Date 1 =

Date 2 =

Date 3 =

Date 4 =

Date 5 =

Date 6 =

Date 7 =

Date 8 =

Date 9 =

Date 10 =

Date 11 =

Date 12 =

Date 13 =

Date 14 =

Dear :

This responds to a letter dated December 23, 2008, on behalf of the Taxpayer requesting an extension of time under § 301.9100-1 of the Procedure and Administration Regulations to make elections under: §§ 852, 855, and 1276(b)(2) of the Code and §§ 1.852-11(f)(1) and 1.855-1(b)(1) of the Income Tax Regulations.

FACTS

The Taxpayer is a non-diversified, closed-end management investment company that was organized under the laws of State X on Date 1. The Taxpayer has elected to be treated as a regulated investment company (RIC) and has annually filed its federal income tax return on Form 1120-RIC for all taxable years preceding the Calendar Year using a taxable year ending on Date 2.

Advisor serves as the Taxpayer's investment advisor and Bank assists Advisor in monitoring the Taxpayer's compliance with applicable federal income tax laws, including the responsibility for ensuring that the Taxpayer's tax returns are timely filed.

In response to the Taxpayer's decision to change the Taxpayer's taxable year from Date 2 to Date 3, commencing with Calendar Year, Bank personnel prepared two copies of Form 1128, *Application to Adopt, Change or Retain a Tax Year*, and delivered them to Advisor on Date 4. Advisor filed a copy with the Service on or before Date 5. On Date 6, the Taxpayer received a notice from the Service informing the Taxpayer that Form 1128 would not be accepted by the Service because an authorized officer of the Taxpayer failed to sign the Form 1128. Bank prepared an amended copy of the Form 1128 and delivered it to the Taxpayer on Date 7. Immediately upon receipt, an authorized officer of the Taxpayer signed and filed the amended copy of Form 1128 with

the Service. On Date 8, the Taxpayer received a notice from the Service, informing the Taxpayer that the Service accepted the Taxpayer's Form 1128, as originally filed on or before Date 5.

The due date for the Taxpayer to file Form 1120-RIC with the Service for the Taxpayer's short taxable year ending on Date 10 (Short Taxable Year) was Date 5. Bank prepared Form 7004, *Automatic 6-Month Extension of Time to File Certain Business Income Tax Information*, for the Taxpayer's Short Taxable Year, copies of which were delivered to Advisor before Date 5. Due to administrative oversight, an Advisor's employee neglected to mail Form 7004 to the Service until Date 11. On Date 12, the Service acknowledged the late receipt and denied acceptance of Form 7004. The Taxpayer filed Form 1120-RIC for its Short Taxable Year on Date 9. On Date 13, the Taxpayer retained the services of Accounting Firm to assist with the preparation of a private letter ruling request in connection with the late filing of Form 1128 and Form 1120-RIC.

The Taxpayer's Form 1120-RIC for the Taxpayer's Short Taxable Year, as filed by the Taxpayer with the Service on Date 9, included a copy of Form 1128, as well as the following elections intended to be made by the Taxpayer: an election under § 855 and § 1.855-1(b)(1) to treat certain distributions declared on Date 14 and paid during the 12-month period following the end of the Taxpayer's Short Taxable Year as having been paid during the Taxpayer's Short Taxable Year; an election to defer all or a portion of the Taxpayer's net capital loss or net long-term capital loss incurred by the Taxpayer in the post-October part of the taxable year in computing the Taxpayer's Short Taxable Year investment company taxable income and net capital gain, in accordance with § 852(b)(3)(C) and § 1.852-11(f)(1); and an election to employ the constant yield method in computing the Taxpayer's Short Taxable Year taxable income as a result of the Taxpayer's acquisition of debt instruments with market discount during the Short Taxable Year, in accordance with § 1276(b)(2)(A) and Rev. Proc. 92-67.

The Taxpayer also makes the following additional representations:

1. The request for relief was filed by the Taxpayer before the failure to make the regulatory elections was discovered by the Service.
2. Granting the relief requested will not result in the Taxpayer having a lower tax liability in the aggregate for all years to which the regulatory elections apply than the Taxpayer would have had if the election had been timely made (taking into account the time value of money).
3. The Taxpayer did not seek to alter a return position for which an accuracy-related penalty has been or could have been imposed under section 6662 of the Code at the time they requested relief and the new position requires or permits a regulatory election for which relief is requested.
4. Being fully informed of the required regulatory election and related tax consequences, the Taxpayer did not choose to not file the election.

LAW AND ANALYSIS

Section 852(b)(3)(C) of the Internal Revenue Code provides that the amount of a RIC's net capital gain for a taxable year (to which an election under § 4982(e)(4) does not apply) shall be determined without regard to any capital loss or net long-term capital loss attributable to transactions after October 31 of such taxable year (collectively, post-October capital losses), and any post-October capital losses are treated as arising on the first day of the next taxable year. This Code section further provides that to the extent provided in regulations promulgated under § 852(b)(3)(C) of the Code, the preceding sentence shall apply also for purposes of computing the RIC's taxable income. Section 1.852-11(f)(1) of the Income Tax Regulations generally provides, in relevant part, that a RIC may elect, in accordance with the procedures set forth under § 1.852-11(i), to compute its taxable income for a taxable year without regard to part or all of any post-October capital loss for that year. Section 1.852-11(i) of the regulations provides that a RIC may make the election for a taxable year by completing its income tax return (including any necessary schedules) for that taxable year in accordance with the instructions for those items applicable to the election.

Under § 855(a) of the Code, if a RIC declares a dividend before the due date (including extensions) for filing its income tax return for a taxable year, and distributes the dividend in the 12-month period following the end of the tax year (and not later than the date of the first regular dividend payment made after the declaration), the dividend is considered paid during the taxable year, if the RIC so elects on its income tax return for the taxable year. Section 1.855-1(b)(1) of the Income Tax Regulations sets forth the method of making the election and provides that the election must be made in the return filed by the RIC for the taxable year.

Section 1276(b)(2) of the Code provides that gain on the disposition of any market discount bond is treated as ordinary income to the extent of accrued market discount on the bond. Section 1278(a)(1) defines a market discount bond as any bond having market discount with certain exceptions. Market discount is generally defined by §1278(a)(2) as the excess of the stated redemption price of a bond at maturity over the basis of the bond immediately after its acquisition. Section 1276(b)(1) states that, except as otherwise provided, market discount should be calculated by the taxpayer using the ratable accrual method. Section 1276(b) allows an election by a taxpayer to calculate the accrued market discount using the constant interest rate method. This irrevocable election must be made on a bond-by-bond basis, and must be made in an income tax return that is filed by the taxpayer with the Internal Revenue Service no later than the due date (including extensions) for the income tax return for which the taxpayer is required to determine accrued market discount. See Rev. Proc. 92-67, 1992-2 C.B. 429, Section 2.12.

Section 301.9100-1(c) of the Procedure and Administration Regulations provides, in part, that the Commissioner has discretion to grant a reasonable extension of time to make a regulatory election (defined in § 301.9100-1(b) as an election whose due date is prescribed by regulations or by a revenue ruling, a revenue procedure, a notice, or an announcement published in the Internal Revenue Bulletin), or a statutory election (but no more than 6 months except in the case of a taxpayer who is abroad), under all subtitles of the Internal Revenue Code except subtitles E, G, H, and I.

Sections 301.9100-3(a) through (c)(1)(i) set forth rules that the Internal Revenue Service generally will use to determine whether, under the facts and circumstances of each situation, the Commissioner will grant an extension of time for regulatory elections that do not meet the requirements of § 301.9100-2. Section 301.9100-3(b) provides that subject to paragraphs (b)(3)(i) through (iii) of § 301.9100-3, when a taxpayer applies for relief under this section before the failure to make the regulatory election is discovered by the Service, the taxpayer will be deemed to have acted reasonably and in good faith; and § 301.9100-3(c) provides 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 years to which the regulatory election applies than the taxpayer would have had if the election had been timely made (taking into account the time value of money.)

CONCLUSION

Based on the information submitted and representations made, we conclude that Taxpayer has satisfied the requirements for granting a reasonable extension of time to make an election under § 855 and § 1.855-1(b)(1) to treat dividends paid after the end of the Taxpayer's Short Taxable Year as having been paid during the Taxpayer's Short Taxable Year; to make an election to defer all or a portion of the Taxpayer's net capital loss or net long-term capital loss incurred by the Taxpayer in the post-October part of the taxable year in computing the Taxpayer's Short Taxable Year investment company taxable income and net capital gain, in accordance with § 852(b)(3)(C) and § 1.852-11(f)(1); and to make an election to employ the constant yield method in computing the Taxpayer's Short Taxable Year taxable income as a result of the Taxpayer's acquisition of debt instruments with market discount during the Short Taxable Year, in accordance with § 1276(b)(2)(A) and Rev. Proc. 92-67.

The Taxpayer requested that Form 1128 requesting permission to change its annual accounting period for federal income tax purposes from a taxable year ending Date 2 to a taxable year ending Date 3, effective for the Calendar Year be considered timely filed under an exercise of the Commission's discretionary authority contained in § 301.9100-3. Upon review, Form 1128 was determined to have been timely filed under the provisions of Rev. Proc. 2006-45. Accordingly, no late-filing relief is required under the circumstances. The separate \$2800 "user fee" the Taxpayer paid in connection with this matter will be refunded in a later correspondence.

Accordingly, the Taxpayer's elections described above made on the Taxpayer's Form 1120-RIC filed on Date 9 for Taxpayer's Short Taxable Year will be treated as having been timely made.

This ruling is limited to the timeliness of the Taxpayer's elections described above. This ruling's application is limited to the facts, representations, Code sections, and regulations cited herein. No opinion is expressed with regard to whether Taxpayer qualifies as a RIC under subchapter M of the Code.

No opinion is expressed with regard to whether the Taxpayer's tax liability is not lower in the aggregate for all years to which the election applies than such tax 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 returns involved, the director's office will determine such tax liability for the years involved. If the director's office determines that such tax liability is lower, that office will determine the federal income tax effect.

The ruling contained in this letter is based upon information and representations 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.

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 representatives.

Sincerely,

Alice M. Bennett
Alice M. Bennett
Chief, Branch 3
Office of Associate Chief Counsel
(Financial Institutions & Products)