

**Internal Revenue Service**

Department of the Treasury  
Washington, DC 20224

Number: **201316014**  
Release Date: 4/19/2013

[Third Party Communication:  
Date of Communication: Month DD, YYYY]

Index Number: 565.01-00, 9100.00-00

Person To Contact:  
, ID No.

Telephone Number:

Refer Reply To:  
CC:ITA:B01  
PLR-141519-12

Date:  
January 16, 2013

Taxpayer =  
Shareholder =  
Parent =  
Year 1 =  
Year 2 =  
Year 3 =  
Year 4 =  
Date 1 =  
Country X =  
\$a =  
\$b =

Dear :

This responds to a letter dated September 20, 2012, which requests an extension of time under §§ 301.9100-1 and -3 of the Procedure and Administration Regulations for Taxpayer to make consent dividend elections pursuant to § 565 of the Internal Revenue Code.

**FACTS**

Taxpayer was formed in Year 1 for the purpose of investing in U.S. commercial real estate opportunities. Taxpayer elected to be taxed as a U.S. real estate investment trust effective Date 1. For U.S. federal tax purposes, Taxpayer's issued and outstanding common stock and Series A preferred shares are owned by Shareholder. Taxpayer's issued and outstanding Series B preferred shares are owned by 125 unrelated investors. Shareholder is an indirect wholly owned subsidiary of Parent, a Country X corporation. Parent, through corporate affiliates and partnerships, has real estate operations in several countries including Country X and the United States. Parent, its subsidiaries and affiliates are collectively referred to as "the Group".

Taxpayer's Series A participating preferred shares' dividend entitlement with respect to any dividend distribution is the sum of a Fixed Return amount and a Participating Return amount. The Fixed Return amount is an amount that must be paid before any dividend on common stock. The Fixed Return amount is cumulative, accrues on a daily basis, and is calculated as a percentage of the Series A participating preferred shares' original issue price. The Participating Return amount has no preference, and is based on a set formula that references the total amount available for distribution. Since the Series A participating preferred shares are not limited in their right to participate and share in Taxpayer's earnings and profits, they may qualify as "consent stock" within the meaning of § 565(f)(1) and § 1.565-6 of the Income Tax Regulations.

The Group's tax department, which is staffed by qualified and experienced tax professionals, is responsible for all of the Group's U.S. tax reporting. Taxpayer declared its first consent dividend for Year 2. Taxpayer made consent dividends on its common stock in the amount of \$a, and on its Series A preferred stock in the amount of \$b. Taxpayer timely filed Form 972, Consent of Shareholder to Include Specific Amount in Gross Income and Form 973, Corporation Claim for Deduction for Consent Dividends with its . While Taxpayer correctly reported the total amount of consent dividends paid on the Forms 972 and 973, it incorrectly attributed the entire amount paid to dividends on common stock. Shareholder properly included the entire amount of consent dividends in its taxable income for Year 2.

The Group's tax department discovered these mistakes in Year 4 as a result of internal reviews in connection with the preparation of Taxpayer's Year 3 tax returns and distributions. The tax department also conducted extensive reviews of Taxpayer's distributions to ensure there were no similar mistakes. No additional consent dividends have been declared since Year 3.

Since both the Series A preferred stock and common stock are owned by Shareholder, the mistake of attributing the entire amount of consent dividends to common stock is a clerical error. Taxpayer has prepared revised Forms 972 and 973 and is ready to file the forms immediately.

## 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). Consent stock includes what is generally known as common stock and participating preferred stock, the

participation rights of which are unlimited. Section 1.565-6 of the Income Tax Regulations.

Section 1.565-1(a) 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 (including extensions) of the corporation's income tax return for the taxable year for which the dividends paid deduction is claimed. With such return, and not later than the due date, the corporation must file Forms 972 for each consenting shareholder, and a return on Form 973 showing by classes the stock outstanding on the first and last days of the taxable year, the dividend rights of such stock, distributions made during the taxable years to shareholders, and give all other information required by the form.

Section 301.9100-3 generally provides extensions of time for making regulatory elections. For this purpose § 301.9100-1(b) defines the term "regulatory election" to include an election whose deadline is prescribed by a revenue ruling, revenue procedure, notice or announcement published in the Internal Revenue Bulletin.

Section 301.9100-3 provides that requests for extensions of time for regulatory elections will be granted when the taxpayer provides evidence (including affidavits described in paragraph (e) of this section) to establish to the satisfaction of the Commissioner that the taxpayer acted reasonably and in good faith and 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 --

(i) requests relief before the failure to make the regulatory election is discovered by the Service;

(ii) inadvertently failed to make the election because of intervening events beyond the taxpayer's control;

(iii) failed to make the election because, after exercising due diligence, the taxpayer was unaware of the necessity for the election;

(iv) reasonably relied on the written advice of the Service; or

(v) reasonably relied on a qualified tax professional, and the tax professional failed to make, or advise the taxpayer to make, the election.

The affidavits presented show that Taxpayer acted reasonably and in good faith, having requested relief before the failure to make the election was discovered by the Service. Under § 301.9100-3(b)(3), a taxpayer will not be considered 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 § 6662 at the time the taxpayer requests relief (taking into account § 1.6664-2(c)(3) of the Income Tax Regulations) and the new position requires 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 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. 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)(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 these criteria, the interests of the government are not prejudiced in this case.

Based on our analysis of the facts, Taxpayer acted reasonably and in good faith, and granting relief will not prejudice the interests of the government. Therefore the requirements of § 301.9100-1 and § 301.9100-3 have been met.

Accordingly, the consent of the Commissioner is hereby granted for an extension of time to amend the § 565 consent dividend election for the taxable Year 2. This extension shall be for a period of 45 days from the date of this ruling. Please attach a copy of this ruling to the returns, schedules and forms filed in connection with making

the election under § 565 when such forms are filed. We enclose a copy of the letter for this purpose.

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 letter must be attached to any income tax return to which it is relevant. 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.

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 ruling, it is subject to verification on examination.

Sincerely,

Lewis K Brickates  
Branch Chief, Branch 1  
Associate Chief Counsel  
(Income Tax & Accounting)

cc: