

## Internal Revenue Service

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Department of the Treasury

Washington, DC 20224

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Person To Contact:

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Date:

July 29, 2014

TY:

Legend

Taxpayer =

EIN:

Trust =

Company =

Parent =

State =

Advisor =

Accounting Firm =

FC =

Year 1 =

Year 2 =

Dear :

This is in response to a letter received by our office on January 30, 2014, submitted by Taxpayer, 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 1296.<sup>1</sup>

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

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<sup>1</sup> 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.

## FACTS

Taxpayer is a single series of Trust, a State trust that is registered as an open-end management investment company under the Investment Company Act of 1940, as amended, and is taxed as a regulated investment company (RIC) under subchapter M of the Internal Revenue Code. Taxpayer and each series of Trust are treated as separate corporations under section 851(g). Shares of Taxpayer are offered only to separate accounts that fund insurance contracts issued by Company (an insurance company), its affiliates, and third-party insurance companies. Company is a subsidiary of Parent.

An outside consultant, Advisor, prepares the annual tax provisions and separate income tax returns for Trust and its underlying funds, including Taxpayer. In addition, Accounting Firm, a reputable accounting firm, reviews the provisions and returns prepared by Advisor as part of auditing services for Parent. The provisions and returns prepared by Advisor are also reviewed by Company's corporate tax department. Company also uses a service of Accounting Firm that is separate from the audit services; the service is used to identify any passive foreign investment company (PFIC) securities held in Trust's underlying funds, including Taxpayer.

In Year 1, Taxpayer purchased publicly-traded shares of FC, a PFIC as defined in section 1297. As part of preparing the Year 1 returns, Accounting Firm identified FC as a PFIC in its report. However, Advisor failed to advise Taxpayer to make a mark-to-market election with respect to FC. In preparing the Year 2 tax provision, Advisor discovered the error made in Year 1 with respect to FC.

Taxpayer has submitted affidavits, under penalties of perjury, that describe the events that led to the failure to make a mark-to-market election with respect to FC by the election due date, including an affidavit from Advisor.

Taxpayer represents that, as of the date of this request for ruling, the PFIC status of FC had not been raised by the IRS on audit of Taxpayer for any of the taxable years at issue.

## RULING REQUESTED

Taxpayer requests the consent of the Commissioner to grant an extension of time under Treas. Reg. §301.9100-3 to elect section 1296 mark-to-market treatment with respect to FC.

## LAW

Section 1296(a) provides that, in the case of marketable stock in a passive foreign investment company that is owned (or treated as owned under section 1296(g)) by a

United States person at the close of any taxable year, the United States 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, except as provided in Treas. Reg. § 301.9100-3(b)(3), a taxpayer is 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 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 (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.

Treas. Reg. § 301.9100-3(b)(3) provides that a taxpayer is deemed not to have acted reasonably or 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 (taking into account any qualified amended return filed within the meaning of Treas. Reg. § 1.6664-2(c)(3)) 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.

Treas. Reg. § 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). Treas. Reg. § 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 is closed, 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

## CONCLUSION

Based on the information and representations submitted, we conclude that Taxpayer satisfies the requirements for a reasonable extension of time to make the mark-to-market election under section 1296 of the Code with respect to FC. Accordingly, Taxpayer is granted an extension of time of 60 days from the date of this letter to make the election under section 1296 with respect to the stock of FC for Year 1.

The granting of an extension of time is not a determination that Taxpayer is otherwise eligible to make the election under section 1296. Treas. Reg. § 301.9100-1(a).

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 who requested it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.

Sincerely,

Jeffery G. Mitchell  
Chief, Branch 2  
Office of the Associate Chief Counsel  
(International)