

Internal Revenue Service

Department of the Treasury
Washington, DC 20224

Number: **201804005**

Release Date: 1/26/2018

Index Number: 501.38-02, 9100.00-00

Third Party Communication: None
Date of Communication: Not Applicable

Person To Contact:
, ID No.

Telephone Number:

Refer Reply To:
CC:TEGE:EOEG:EO1
PLR-119813-17

Date:
September 27, 2017

Legend:

- V =
- W =
- X =
- Y =
- Z =
- Date 1 =
- Date 2 =
- Date 3 =

Dear _____ :

This letter responds to X's June 19, 2017, request for a ruling permitting an extension of time to revoke an election under I.R.C. § 501(h) of the Internal Revenue Code (Code).¹

Facts

According to the information provided by X, each of X (formerly known as Y), V, and W is a charitable organization with the purpose to promote health, and each is recognized as exempt from federal income tax under section 501(c)(3) and as a public charity under section 509(a). V and W are separate corporations with overlapping directors.

¹ Section 501(h) of the Internal Revenue Code of 1986, as amended, to which all subsequent section references are made unless otherwise stated.

V conducts direct operations in some states and has several tax-exempt operating subsidiaries in other states. Following ongoing discussions between V and Y, on Date 3 V formally affiliated with Y. In order to effectuate the affiliation, Z, an organization of which V is the sole member, became the sole member of Y. Y changed its name to X shortly thereafter.

Prior to its affiliation with Y, V retained a professional services firm to perform due diligence on the operations and financial state of Y. Despite this process, the issue of Y revoking its election under section 501(h) by Date 1, so that it would not be in effect for the taxable year beginning Date 2, was not raised or pursued. As such, when Y officially affiliated with V on Date 3, V and its affiliated organizations were not aware of any known or foreseeable tax impact of Y's existing 501(h) election despite acting in good faith.

Within a few weeks following V's affiliation with Y on Date 3, it was discovered that a section 501(h) lobbying expenditure test election ("Lobbying Election") had been made many years ago by Y (and that the Forms 990 for Y have been filed referencing the section 501(h) election). Further, it was discovered that Y's section 501(h) election was still in effect.

Given the amount of the lobbying expenses made by V and its affiliates and the potential risk to X in being viewed as affiliated with V, W, and the other affiliates for purposes of applying the lobbying tests and limitations, X immediately consulted with its tax advisors to assist in its preparation for a request for discretionary relief with the Internal Revenue Service (IRS) under Treas. Reg. § 301.9100. X has yet to file a Form 990 return that covers a period on or after Date 3. X's ruling request includes the representations and affidavits required under Treas. Reg. § 301.9100-3.

Ruling Requested

X requests a ruling that, having acted reasonably and in good faith, X shall be granted discretionary relief under section 301.9100-3 of the Procedure and Administration Regulations and is hereby granted an extension of time of 30 days from the letter ruling date to file a revocation of its section 501(h) lobbying election, to be effective for all tax years beginning after Date 1.

Law

Section 501(c)(3) exempts from federal income tax an organization organized and operated exclusively for charitable purposes, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in section 501(h)).

Section 501(h) sets out an alternative to the "no substantial part" limitation on expenditures made for the purposes of influencing legislation, based on expenditures for lobbying during the taxable year.

Section 501(h)(3) provides that section 501(h) shall apply to certain organizations that elect (in such manner and at such time as the Secretary may prescribe) to have the provisions of section 501(h) apply.

Section 501(h)(6) provides that an organization's section 501(h) election is effective for all taxable years that end after the date the election is made, and begin before the date the election is revoked by the organization (under regulations prescribed by the Secretary).

Section 1.501(h)-2(a) provides that a section 501(h) election is made by filing a completed Form 5768 with the appropriate Internal Revenue Service Center, and remains in effect for each succeeding taxable year for which the organization is an eligible organization and which begins before a notice of revocation is filed under section 1.501(h)-2(d).

Section 1.501(h)-2(d)(1) provides that an organization may voluntarily revoke a section 501(h) lobbying election by filing Form 5768.

Section 4911(f)(1)(A) provides that when two or more organizations are affiliated, and at least one has made a section 501(h) election, the determination as to whether excess lobbying expenditures have been made and the expenditure limits of section 501(h) have been exceeded, shall be made as though the affiliated organizations are one organization.

Section 4911(f)(1)(B) provides that if an affiliated group has excess lobbying expenditures, each such organization as to which an election under section 501(h) is effective for such year shall be treated as an organization which has excess lobbying expenditures in an amount which equals such organization's proportionate share of such group's excess lobbying expenditures.

Section 4911(f)(2) defines two organizations as members of an affiliated group if the governing instrument of one organization requires it to be bound by the decisions of another on legislative issues, or if the governing board of one organization includes persons who are either specifically designated representatives or members of the governing board, officers, or paid executive staff of another organization, and who, by aggregating their votes, have sufficient power to cause or prevent action on legislative issues by the first organization.

Section 301.9100-1(a) provides that the regulations under sections 301.9100-1, -2, and -3 provide the standards the Commissioner will use to determine whether to grant an extension of time to make a regulatory election. The regulations under sections 301.9100-1 and -2 also provide an automatic extension of time to make certain statutory elections. Section 301.9100-2 provides automatic extensions of time for

making regulatory and statutory elections when the deadline for making the election is the due date of the return or the due date of the return including extensions. Section 301.9100-3 provides extensions of time for making regulatory elections that do not meet the requirements of section 301.9100-2.

Section 301.9100-1(b) defines a “regulatory election” as an election whose due date is prescribed by a regulation published in the Federal Register, revenue ruling, revenue procedure, notice, or announcement published in the Internal Revenue Bulletin, and a “statutory election” as an election whose due date is prescribed by statute.

Section 301.9100-1(c) provides that the Commissioner in exercising the Commissioner's discretion may grant a reasonable extension of time under the rules set forth in sections 301.9100-2 and -3 to make a regulatory election, 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.

Section 301.9100-3(a) allows a request for an extension of time to file a regulatory election to be granted when the taxpayer provides the evidence 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.

Section 301.9100-3(b)(1)(i) provides generally that the taxpayer will be deemed to have acted reasonably and in good faith if the taxpayer requests relief before the failure to make the regulatory election is discovered by the IRS.

Section 301.9100-3(b)(3) provides that 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 could be imposed under section 6662 at the time the taxpayer requests relief and the new position requires a regulatory election for which relief is requested;
- (ii) Chooses not to make the election, being fully informed of the required election and related consequences; or
- (iii) Uses hindsight in requesting relief. If specific facts have changed since the original deadline that makes the election advantageous to a taxpayer, the IRS will not ordinarily grant relief.

Section 301.9100-3(c)(1) provides that the interests of the Government are prejudiced when:

- (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. Similarly, if the tax

consequences of more than one taxpayer are affected by the election, the Government's interests are prejudiced if there may be a resulting decrease in the aggregate tax liability for all affected taxpayers.

(ii) 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 section 6501(a) before the taxpayer's receipt of a ruling granting relief (the Government's interests are ordinarily prejudiced in such case).

Section 301.9100-3(e)(2) provides that the taxpayer, or the individual who acts on behalf of the taxpayer with respect to tax matters, must submit a detailed affidavit describing the events that led to the failure to make a valid regulatory election and to the discovery of the failure. When the taxpayer relied on a qualified tax professional for advice, the taxpayer's affidavit must describe the engagement and responsibilities of the professional as well as the extent to which the taxpayer relied on the professional. The affidavit must be accompanied by a dated declaration, signed by the taxpayer, which states: "Under penalties of perjury, I declare that I have examined this request, including accompanying documents, and, to the best of my knowledge and belief, the request contains all the relevant facts relating to the request, and such facts are true, correct, and complete." The individual who signs for an entity must have personal knowledge of the facts and circumstances at issue.

Section 301.9100-3(e)(3) provides that the taxpayer must submit detailed affidavits from the individuals having knowledge or information about the events that led to the failure to make a valid regulatory election and to the discovery of the failure. These individuals must include the taxpayer's return preparer, any individual (including an employee of the taxpayer) who made a substantial contribution to the preparation of the return, and any accountant or attorney, knowledgeable in tax matters, who advised the taxpayer with regard to the election. An affidavit must describe the engagement and responsibilities of the individual as well as the advice that the individual provided to the taxpayer. Each affidavit must include the name, current address, and taxpayer identification number of the individual, and be accompanied by a dated declaration, signed by the individual, which states: "Under penalties of perjury, I declare that I have examined this request, including accompanying documents, and, to the best of my knowledge and belief, the request contains all the relevant facts relating to the request, and such facts are true, correct, and complete."

Section 301.9100-3(e)(4) provides that the request for relief must also contain the following information -

(i) The taxpayer must state whether the taxpayer's return(s) for 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 is being examined by a district director, or is being considered by an appeals

office or a federal court. The taxpayer must notify the IRS office considering the request for relief if the IRS starts an examination of any such return while the taxpayer's request for relief is pending;

(ii) The taxpayer must state when the applicable return, form, or statement used to make the election was required to be filed and when it was actually filed;

(iii) The taxpayer must submit a copy of any documents that refer to the election;

(iv) When requested, the taxpayer must submit a copy of the taxpayer's return for any taxable year for which the taxpayer requests an extension of time to make the election and any return affected by the election; and

(v) When applicable, the taxpayer must submit a copy of the returns of other taxpayers affected by the election.

Rev. Rul. 83-74, 1983-1 C.B. 112, granted relief under section 1.9100-1 to a homeowner's association seeking to revoke its section 528 election, reasoning that the situation of a taxpayer seeking relief to revoke an election is analogous to one where a taxpayer is seeking relief to make an election.

Section 5.03(1) of Rev. Proc. 2017-1, 2017-1 I.R.B. 1, provides that a section 301.9100 request must include an affidavit and declaration from the taxpayer and other parties having knowledge or information about the events that led to the failure to make a valid regulatory election and to the discovery of the failure. See sections 301.9100-3(e)(2) and (e)(3). In addition, a section 301.9100 request must include the information required by section 301.9100-3(e)(4).

Analysis

A taxpayer may seek relief under section 301.9100-1 through -3 for an extension of time to file a regulatory election. A taxpayer seeking relief to revoke an election is in a position analogous to one seeking relief to make an election, as discussed in Rev. Rul. 83-74, and thus the provisions of sections 301.9100-1 through -3 apply to the same extent.

We have determined that the section 501(h) election at issue is a regulatory election subject to relief under section 301.9100-3 for a late election (or revocation of election). While section 501(h)(6) appears to prescribe the due date for the election and revocation, section 501(h)(2) expressly provides that section 501(h) applies to an organization which has elected (in such manner and at such time as the Secretary may prescribe) to have the provisions of section 501(h) apply, and section 501(h)(6) similarly

provides that a section 501(h) election is effective for taxable years which begin before the date the election is revoked (under regulations prescribed by the Secretary). Thus we consider the regulations rather than the statute to prescribe the due date for a section 501(h) election (or revocation).

Furthermore, based solely on the information submitted and the representations made, we conclude that the requirements of sections 301.9100-1 and 301.9100-3 have been satisfied, including reasonable action, good faith, and lack of prejudice to the interests of the government. As a result, X is granted an extension of time of 30 days from the date of this letter to file a Form 5768 with the appropriate service center to revoke its 501(h) election, effective Date 2. A copy of this letter should be attached to the Form 5768. A copy is enclosed for that purpose.

Ruling

Based solely on the facts and representations submitted by X, we rule that, having acted reasonably and in good faith, X shall be granted discretionary relief under section 301.9100-3 of the Procedure and Administration Regulations and is hereby granted an extension of time of 30 days from the letter ruling date to file a revocation of its section 501(h) lobbying election, to be effective for all tax years beginning after Date 1.

The ruling contained in this letter is based upon information and representations submitted by or on behalf of X and accompanied by a penalty of perjury statement executed by an appropriate party, as specified in Rev. Proc. 2017-1, 2017-1 I.R.B. 1, section 7.01(15)(b). This office has not verified any of the material submitted in support of the request for ruling, and such material is subject to verification on examination. This letter does not address the applicability of the Code or regulations to the facts submitted other than with respect to the sections specifically described. The Associate Office will revoke or modify a letter ruling and apply the revocation retroactively if: (1) there has been a misstatement or omission of controlling facts; (2) the facts at the time of the transaction are materially different from the controlling facts on which the ruling is based; or (3) the transaction involves a continuing action or series of actions and the controlling facts change during the course of the transaction. See Rev. Proc. 2017-1, section 11.05.

No ruling is granted as to whether X qualifies as an organization described in section 501(c) and/or section 509(a)(1), (2), or (3). Except as expressly provided in this letter, no opinion is expressed or implied concerning the federal income tax consequences of any aspects of any transaction or item of income referenced in this letter ruling. Additionally, this letter is directed only to X. Section 6110(k)(3) 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 each of X's authorized representatives.

If you have any questions about this ruling, please contact the person whose name and telephone number are shown in the heading of this letter.

Sincerely,

David L. Marshall
Assistant Branch Chief
Exempt Organizations Branch 1
(Tax Exempt & Government Entities)